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United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol
2296

MONARCH BREWING COMPANY, a corpo-
ration,

Appellant,

VS.

GEORGE J. MEYER MANUFACTURING COM-
PANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR - 7 1942

United States
Circuit Court of Appeals
For the Ninth Circuit.

MONARCH BREWING COMPANY, a corporation,

Appellant,


vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

MESSRS. LAWLER, FELIX & HALL,
MAX FELIX, Esq.,
WILLIAM T. COFFIN, Esq.,
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Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 452-304

MONARCH BREWING COMPANY, a corporation,

Plaintiff,

vs.

GEO. J. MEYER MANUFACTURING CO., a corporation,

Defendant.

COMPLAINT—DAMAGES FOR BREACH
OF WARRANTY.

Comes now the above named plaintiff and complaining of the above named defendant for cause of action alleges as follows:

I.

That plaintiff, Monarch Brewing Company is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of California and having for its principal place of business the city of Los Angeles, county of Los Angeles, state of California.

II.

That plaintiff is informed and believes, and upon such information and belief alleges that defendant, Geo. J. Meyer Manufacturing Company is now and

at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin and having for its principal place of business [2] the City of Cudahy, State of Wisconsin; that at all times herein mentioned defendant has been and now is a foreign corporation transacting intrastate business in the State of California.

III.

That heretofore, to wit, on or about the 14th day of February 1938, plaintiff and defendant entered into an agreement in writing wherein plaintiff agreed to purchase from defendant and defendant agreed to sell to plaintiff the following described machinery:

- 1 #516 Qt. Meyer Dumore Bottle Cleaner complete with motor and continuous soaker drive
1840 bottles immersed
- 1 40 valve Meyer Dumore Filler
- 1 #1050 Meyer Cataract Pasteurizer
Necessary Bottle Conveyor

For the total purchase price of \$52,700.00, payable \$3,500.00 down payment and the balance as particularly set forth in said contract of sale; that a full, true and correct copy of said contract is attached hereto, marked exhibit "A", incorporated herein and made a part hereof, the same as though said contract was set forth fully and at length in this paragraph.

IV.

That plaintiff at all times herein mentioned has been and now is engaged in the business of brewing, bottling and selling beer, and it was plaintiff's purpose in entering into the agreement for the purchase of the machinery hereinbefore described, to use said machinery for the purpose of bottling and pasteurizing the beer manufactured by plaintiff; all of which defendant had knowledge at the time of the execution of the agreement aforesaid, and with such knowledge, defendant represented that the machinery hereinbefore described, would accomplish in conformity with plaintiff's purpose, and with such knowledge, defendant recommended to plaintiff the purchase of said machinery.

That at the time of the execution of the aforesaid contract of sale by the parties thereto, plaintiff had no knowledge whatsoever [3] of the quality and fitness of said machinery to perform the work and services required by plaintiff; that at the time of the execution of said agreement, defendant assumed to have knowledge, and, through its agents, stated and represented to plaintiff that said machinery would, in a satisfactory manner, perform and do all of the things which plaintiff desired to have done and performed, by reason of the purchase of said machinery.

V.

That at the time of the execution of the agreement aforesaid, defendant did, in said agreement,

warrant and guarantee the proper working of the said machinery under reasonable operation thereof, according to defendant's instructions.

That at the time of purchase of said machinery, plaintiff relied solely upon the warranty aforesaid, and the superior knowledge which defendant assumed to have, concerning the quality and fitness of said machinery to do the work required by plaintiff:

That plaintiff would not have entered into said contract for the purchase of said machinery had it known (as hereinafter alleged) that said machinery would not do and perform the work as warranted by the defendant.

VI.

That after the execution of the aforesaid agreement in writing and on or about the 6th day of December 1938 said contract in writing was changed and modified by the parties thereto in reference only to the time and manner of payments agreed to be made by plaintiff to defendant on account of the purchase price of said machinery; that at said time, except as in the particulars hereinbefore stated, the original contract in writing dated February 14th 1938, being exhibit "A" attached hereto, was reaffirmed and all of the terms and conditions thereof again agreed upon by said parties, and defendant did again warrant and guarantee to plaintiff the proper working of the machinery under reasonable operation thereof according to the defend- [4] ant's instructions.

VII.

That defendant shipped said machinery to plaintiff on or about April 27th 1938, and, pursuant to the terms and conditions of the contract dated February 14th, 1938, defendant furnished an engineer to supervise the installation and erection of said machinery in plaintiff's brewery plant.

That ever since such installation and erection, said machinery has failed to work properly, though operated reasonably and according to defendant's instructions.

That from May 6th 1938 to July 9th 1938, defendant's agents and employees consumed a period of some 313 hours in attempting to make said machinery work properly in accordance with defendant's warranty. That defendant continuously, from time to time, during the period from July 9th 1938 to March 20, 1940, notified and complained to defendant that said machinery was not working properly although plaintiff operated same reasonably and according to defendant's instructions.

That ever since the installation and erection of said machinery defendant has assured plaintiff that said machinery would eventually work properly, and from about the 9th day of July 1938 to the present time, has caused its agents and employees, without charge or expense to plaintiff, to endeavor to fix and adjust said machinery so that it would comply with the warranty made by defendant to plaintiff, as set forth in said written contract, that during

said period of time defendant's agents and employees have worked for a period of 405 hours in an endeavor to make said machinery comply with said warranty.

That plaintiff relied upon the assurances of the defendant that said machinery would eventually be made to work properly in compliance with defendant's warranty and did not bring suit for breach of said warranty by reason of said reliance.

That plaintiff has performed all the matters and things agreed by it to be performed under its contracts with defendant. [5]

VIII.

That ever since the installation of said machinery and almost daily, various parts thereof broke, and became out of adjustment, thereby causing shut-downs in the operation of said machinery, lasting anywhere from one half to three hours for each shut-down; that by reason of the breach of defendant's warranty, plaintiff has thereby been damaged in the sum of \$50,000.00 no part of which sum has been paid.

Wherefore plaintiff prays judgment against said defendant for the sum of \$50,000.00, damages, for breach of warranty; Plaintiff's costs and disbursements of this suit and for such other and further relief as may be meet and proper.

ALFRED F. MacDONALD,
Attorney for Plaintiff.

CONTRACT

ORIGINAL—Seller-Office
NOTE: Do not write on this copy after
it is signed.

County _____ State _____ Date 1938 _____
Geo. J. Meyer Manufacturing Co., a Corporation, Cudahy, Wis., (Seller) SHIP as follows:
(Suburb of Milwaukee)

on or about subject to delays beyond your control
(BUYER)

Street _____ City _____ via _____
ONLY THE GOODS AS SPECIFIED IN DETAIL BELOW—F.O.B. CARS FACTORY CUDAHY
VERBAL UNDERSTANDINGS ARE NOT BINDING UNLESS SPECIFIED IN THIS CONTRACT

LIST PRICE OF ALL ITEMS
ORDERED

Cars Factory Cudahy	Add Freight \$	Add Placing \$	Total \$
Bottle Conveyor @ \$12.00 / ft	Angle Brkts @ \$75	Drives @ \$150	

years from date of shipment, which in Seller's opinion are defective or worn out through normal use. Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods. This guarantee does not apply to brushes, brush tubes, electrical equipment, gauges, instruments or procurable commercial parts.

BUYER to furnish sample bottles, foundations, openings in building, place machines and connect steam, water and electric lines to headers and all labor required and pay costs if engineers are detained or recalled through Buyer's fault.

Seller (~~will~~) furnish engineer to supervise erection and service total _____ hours.
Traded-in machinery, including all parts, to be removed, stored and loaded in cars by Buyer. Discount forfeited if payments defaulted.

~~Notwithstanding anything in this contract to the contrary~~ Seller agrees to ship these goods not later than April 15, 1938.

1938 ~~2-11~~
GEO. J. MEYER MANUFACTURING CO.
(SELLER)

By _____
WITNESS FOR SELLER

By _____
WITNESS FOR BUYER

Two witnesses desired by _____
All contracts subject to approval by an officer of seller corporation at home office; not subject to cancellation.

State of California,
County of Los Angeles—ss.

L. L. Lambing being by me first duly sworn, deposes and says: that he is an officer, to wit, the secretary of Monarch Brewing Company, a corporation, the Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

L. L. LAMBING

Subscribed and sworn to before me this 15 day of May, 1940.

(Seal)

CATHERINE KIMZEY,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires July 14, 1943.

[Endorsed]. Filed May 16 P. M. 4:02, 1940. L. E. Lampton, County Clerk, By G. G. Dunn, Deputy.

[9]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO
THE CENTRAL DIVISION OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALI-
FORNIA.

To the Honorable the Superior Court of the State
of California, in and for the County of Los
Angeles:

Your petitioner, George J. Meyer Manufacturing
Company, a corporation, respectfully shows to this
Honorable Court:

I.

That your petitioner is the defendant in the above
entitled action; that said action was heretofore
brought by plaintiff above named in this Court and
is now pending therein and that summons has been
issued therein; that the time has not yet expired
[10] within which your petitioner is required by the
laws of the State of California or the rules of this
Court to answer or plead to plaintiff's complaint
on file in said action.

II.

That plaintiff was at the time of the commence-
ment of said action, and still is, a corporation duly
organized and existing under and by virtue of the
laws of the State of California, and having its princi-
pal office and place of business in the County of Los

Angeles, State of California, and is accordingly a citizen and resident of said County of Los Angeles, in the Central Division of the Southern District of California; that your petitioner at the time of the commencement of this action was, and still is, a corporation duly organized and existing under the laws of the State of Wisconsin, having its principal place of business in the County of Milwaukee, State of Wisconsin, and is a citizen and resident of said State of Wisconsin and a non-resident of said State of California; that the above entitled action, therefore, involves a controversy between citizens of different states.

III.

That the above entitled action is of a civil nature and was brought by the plaintiff for the purpose of recovering damages in the sum of Fifty Thousand Dollars (\$50,000.00) alleged to have been incurred by plaintiff by reason of your petitioner's alleged breach of an alleged warranty, all as more fully appears from plaintiff's complaint on file in said action, which said complaint is hereby referred to and made a part hereof; that your petitioner denies the alleged liability, the alleged damages and disputes the claim of plaintiff; that the matter in controversy between plaintiff and your petitioner at the time of the commencement of the above entitled action exceeded, ever since has exceeded, and [11] now exceeds, the sum and value of Three Thousand Dollars (\$3,000.00), exclusive of interest

and costs; that the matter in controversy is the alleged breach by your petitioner of the alleged warranty, as set forth in said complaint and which breach as aforesaid is alleged to have caused damage to the plaintiff in the sum of Fifty Thousand Dollars (\$50,000.00).

IV.

That your petitioner avers that it has made and filed herein its bond with good and sufficient surety that it will, within thirty (30) days from the date of filing this petition, enter in the Central Division of the District Court of the United States for the Southern District of California, a certified copy of the record in this cause, and for special bail, should any have been required, and for the payment of all costs that may be awarded by the said District Court, should said District Court hold that said action was wrongfully or improperly removed thereto; that your petitioner desires to remove said cause into the Central Division of the District Court of the United States for the Southern District of California, the action being one of which the District Courts of the United States are given original jurisdiction.

Wherefore, your petitioner prays that this petition and said bond be accepted by this Honorable Court and that the said action be removed to the said District Court pursuant to the statute in such cases made and provided, and that a transcript of

the record herein be made and certified as provided by law and that this Court proceed no further in this action.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN,
Attorneys for defendant and
petitioner, George J. Meyer
Manufacturing Company.

[12]

State of California,
County of Los Angeles—ss.

William T. Coffin, being by me first duly sworn, deposes and says: that he is one of the attorneys for George J. Meyer Manufacturing Company, a corporation, the defendant in the above entitled action; that he has read the foregoing Petition for Removal of Cause to the Central Division of the United States District Court for the Southern District of California and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification for and on behalf of said corporation, for the reason that no officer thereof is within the County of Los Angeles,

or the State of California, wherein affiant and his associate counsel maintain their offices.

WILLIAM T. COFFIN

Subscribed and sworn to before me this 27th day of May, 1940.

(Seal)

SADIE BROWN,

Notary Public in and for the County of Los Angeles,
State of California.

Received copy of the within Petition this 27th day of May, 1940.

ALFRED F. MacDONALD

C. WELLS

[Endorsed]: Filed May 27, PM 2:38, 1940. L. E. Lampton, County Clerk. By M. E. Gift, Deputy.

[13]

[Title of District Court and Cause.]

BOND ON REMOVAL.

Know All Men By These Presents:

That George J. Meyer Manufacturing Company, a corporation, defendant in the above entitled action, as Principal, and United States Fidelity and Guaranty Company, a corporation organized for the purpose, among others, of becoming surety upon bonds and undertakes, as Surety, the parties of the first part, are held and firmly bound unto Monarch Brewing Company, a corporation, plaintiff above named, party of the second part, in the sum of

\$500.00, lawful money of the United States, for the payment whereof well and truly to be made unto said party of the second part, the parties of the first part bind themselves, their successors and assigns, jointly and [14] severally by these presents.

Nevertheless upon these conditions:

That the said Principal having filed or being about to file its petition in the Superior Court of the State of California, in and for the County of Los Angeles praying for the removal of a certain cause therein pending as above entitled wherein the party of the second part is plaintiff and the said Principal is defendant, to the Central Division of the District Court of the United States for the Southern District of California.

Now, Therefore, if the said Principal shall enter into said District Court of the United States within thirty days from the date of filings its said Petition for Removal a certified copy of the record in said action, and also shall appear therein and enter special bail in said action, if special bail was originally requisite therein, and shall well and truly pay all costs that may be awarded by the said District Court if said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In Witness Whereof the said George J. Meyer Manufacturing Company, a corporation, and the said United States Fidelity and Guaranty Company,

a corporation, have caused these presents to be executed this 27th day of May, 1940.

GEORGE J. MEYER MANUFACTURING COMPANY,

By WILLIAM T. COFFIN,

[Seal]

One of its attorneys.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By H. C. GILLESPIE,

[Seal]

Attorney-in-Fact.

Approved:

KURTZ KAUFFMAN,

Court Commissioner of Los Angeles County.

Dated: May 27th, 1940. [15]

State of California,

County of Los Angeles—ss.

On this 27th day of May, A. D. 1940, before me, Sadie Brown, a Notary Public in and for said County and State personally appeared William T. Coffin, known to me to be one of the attorneys for George J. Meyer Manufacturing Company, a corporation, and known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same, as such attorney.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Notarial Seal] SADIE BROWN,
Notary Public in and for the County of Los Angeles,
State of California.

State of California,
County of Los Angeles—ss.

On this 27th day of May in the year one thousand nine hundred and forty, before me, Agnes L. Whyte a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared H. C. Gillespie, known to me to be the duly authorized Attorney-in-fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company and the said H. C. Gillespie duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] AGNES L. WHYTE,
Notary Public in and for Los Angeles County, State
of California. My Commission Expires Feb. 26,
1941.

Received copy of the within Bond this 27th day of May, 1940.

ALFRED F. MacDONALD
C. WELLS

[Endorsed]: Filed May 27, P. M. 2:38, 1940.
L. E. Lampton, County Clerk. By M. F. Gift,
Deputy. [16]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

It appearing to the satisfaction of this Court that George J. Meyer Manufacturing Company, a corporation, defendant named in the above entitled action, has this day filed its Petition for Removal of this cause to the Central Division of the District Court of the United States for the Southern District of California, in accordance with the statute therefor provided, and that said defendant has also this day filed its Bond on Removal duly conditioned with good and sufficient surety as provided by law, and it appearing that said Petition for Removal and said Bond were so filed before the presentation thereof to this Court for acceptance and it appearing that due and sufficient written notice of said Petition and Bond for Removal have been given to the plaintiff above named prior to the filing of the same, and the presentation thereof to this Court for approval and it appearing that this is a proper cause for removal to the said District Court: Now, therefore it is hereby ordered, adjudged and [18]

decreed that the said Petition and Bond are hereby accepted, and that this cause be, and it hereby is, removed to the Central Division of the District Court of the United States for the Southern District of California, and the clerk of this court is hereby directed to make up and certify a copy of the record in said cause for transmission to said District Court forthwith.

Dated this 27th day of May, 1940.

THOMAS C. GOULD,

Presiding Judge of the Superior Court

[Endorsed]: Filed May 27 PM 3 09 1940. L. E. Lampton, County Clerk. By I. L. Murstein, Deputy.

State of California,
County of Los Angeles—ss.

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents and orders consisting of Complaint, Notice of Filing and Hearing Petition for Removal, Petition for Removal, Bond on Removal, and written Order for Removal to the District Court of the United States for the Southern District of California (Central Division), in the action of Monarch Brewing Company, a corporation vs. Geo. J. Meyer Manufacturing Co., a corporation, to be full, true and correct copies of all of the original documents on file and/or of record in this office in said action, to date.

In witness whereof, I have hereunto set my hand

and affixed the seal of the Superior Court this 19th day of June, 1940.

L. E. LAMPTON,
County Clerk and ex-officio Clerk of the Superior
Court of the State of California, in and for the
County of Los Angeles,
By M. B. WARD,
Deputy.

[Endorsed]: No. 1035-Y, Civ. Filed Jun. 21,
1940. R. S. Zimmerman, Clerk. [19]

[Title of District Court and Cause.]

MOTION TO DISMISS, MOTION FOR MORE
DEFINITE STATEMENT, AND MOTION
FOR BILL OF PARTICULARS

and

NOTICE OF HEARING OF MOTIONS.

Defendant moves the Court as follows:

I.

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

II.

To order plaintiff to file a more definite statement of its claim in the following respects:

1. By stating how and in what respects the machinery referred to in plaintiff's complaint "failed to work properly", as alleged in Paragraph VII of the complaint.

2. By stating whether all of the machinery referred to in plaintiff's complaint, or only a part thereof, failed to work properly, and if only a part of said machinery, what part or parts thereof and in what respects the same are claimed to have failed to work properly.

3. By stating what are "all of the things which plaintiff desired to have done and performed", referred to in Paragraph IV of plaintiff's complaint. [20]

III.

To order plaintiff to file a bill of particulars in the following respects:

1. Specifying the dates on which the damages alleged in Paragraph VIII of plaintiff's complaint are claimed to have been sustained and the amount of damages claimed on each date.

2. Specifying the nature of each item of the damages alleged in Paragraph VIII of the complaint.

3. Specifying the "various parts" of the machinery referred to in the complaint which are alleged in Paragraph VIII of the complaint to have been broken and become out of adjustment.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN,
Attorneys for Defendant.

NOTICE OF HEARING OF MOTIONS.

To the Plaintiff Above Named, and to Alfred F. MacDonald, Esquire, Its Attorney:

Please Take Notice that the undersigned will bring the foregoing motions on for hearing before this Court at Courtroom No. 5, in the United States Post Office and Court House Building, Los Angeles, California, on the 8th day of July, 1940, at the hour of 10:00 o'clock in the forenoon of that day, or as [21] soon thereafter as counsel may be heard.

Dated this 26th day of June, 1940.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 27, 1940. [22]

At a stated term, to wit: The February Term, A. D. 1940, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 15th day of July in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable Leon R. Yankwich,
District Judge.

No. 1035-Y Civil

MONARCH BREWING COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE J. MEYER MANUFACTURING
COMPANY, a Corporation,

Defendant.

This cause coming on for (1) hearing motion to dismiss, and (2) hearing motion for a more definite statement and motion for Bill of Particulars; Alfred F. MacDonald, Esq., appearing as counsel for the plaintiff; Wm. T. Coffin, Esq., appearing as counsel for the defendant:

Attorney Coffin presents both of the said motions, and Attorney MacDonald replies. It is ordered that the said motions be granted, and the plaintiff is allowed twenty (20) days in which to file amended complaint; and it is ordered the Bill of Particulars be denied. [23]

In the District Court of the United States, Southern
District of California, Central Division

No. 1035-Y Civil

MONARCH BREWING COMPANY,
a corporation,

Plaintiff,

vs.

GEORGE J. MEYER MANUFACTURING
COMPANY, a corporation,

Defendant.

AMENDED COMPLAINT—DAMAGES FOR
BREACH OF WARRANTY

Comes now the above named plaintiff and complaining of the above named defendant for cause of action, alleges as follows:

I.

That plaintiff, Monarch Brewing Company, is now, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California, and having for its principal place of business the City of Los Angeles, County of Los Angeles, State of California, and is accordingly a citizen and resident of said County of Los Angeles, in the Central Division of the Southern District of California.

That defendant, George J. Meyer Manufacturing Company, is now, and at all times herein mentioned has been, a corporation duly organized and existing

under and by virtue of the laws of the State of Wisconsin, and having for its principal place of business the City of Cudahy, County of Milwaukee, State of Wisconsin; and is a citizen and resident of said State of Wisconsin, and a non-resident of the State of California.

II.

That the matter in controversy between plaintiff and defendant, at the time of the commencement of the above entitled [24] action, exceeded, ever since has exceeded and now exceeds the sum and value of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

III.

That plaintiff, at all times herein mentioned, has been and now is engaged in the business of brewing, bottling and selling beer. That prior to the time of entering into the contract hereinafter referred to, plaintiff, in the bottling of its beer, was using certain machinery, the operation of which required the services of seventeen (17) men, and the maximum production of which was fifteen hundred (1500) cases of eleven (11) ounce, steinie bottles per day; that the cost of the bottling labor for each case of beer bottled by said machinery was nine (9¢) cents per case.

That it was plaintiff's desire to acquire new bottling machinery, which said machinery would increase to a substantial extent the production of the cases of beer bottled per day, and at the same time

reduce the operating expenses connected therewith. That in addition thereto, it was plaintiff's desire to acquire beer bottling machinery which would be reasonably fit for the particular purpose for which said machinery was required—to-wit: the bottling of the beer manufactured by plaintiff.

That plaintiff, prior to the 14th day of February, 1938, communicated to the defendant its desires, as hereinbefore set forth, and defendant did thereupon represent to plaintiff as follows:

1. That defendant was the manufacturer of certain beer bottling machinery described as follows: Bottle cleaner, complete with motor and continuous soaker drive, 1840 bottles immersed, a 40 valve filler, and a #1050 cataract pasteurizer, [25] which said machinery was, as to quality and fitness, such as to meet the needs and requirements of plaintiff, and that said machinery required in its operation the services *on* only twenty (20) men per day, and that said machinery was capable of, and would produce thirty-six hundred (3600) cases of eleven (11) ounce steinie bottles per day, resulting in a bottling labor saving of between 4.5 cents and 5¢ per case per day.

2. That the services of only two (2) men would be required to load that portion of said machinery known as the cleaner, and that the bottles coming out of the cleaner required the services of no person to control or supervise the unloading of said bottles coming out of the

cleaner, inasmuch as the said machinery was equipped with an automatic unloader, which dispensed with labor in this particular.

3. That that portion of the machinery known as the pasteurizer, was so constructed that it had an automatic load and unload, thereby dispensing with the services of any person to supervise or control the unloading of the bottles at the take-off end of the pasteurizer.

4. That that portion of the machinery known as the soaker had a rated speed, or capacity, to handle empty bottles placed therein, of between one hundred sixty (160) and one hundred eighty (180) bottles per minute, which figures were conservative and were net of any normal shut-downs or breakdowns in the operation of said machinery.

5. That said equipment had a long life, and that the depreciation thereof did not exceed five (5%) percent to ten (10%) percent depreciation per annum. [26]

6. That the maintenance and repair costs on said machinery would be lower than on the machinery then being used by the plaintiff.

7. That said machinery would clean bottles with only a two and one-half percent ($2\frac{1}{2}\%$) solution of caustic soda.

8. That that portion of the machinery known as the pasteurizer was self-cleaning, and that said pasteurizer was so constructed that all

bottled beer passing through same would, at all times, be properly pasteurized.

IV.

That defendant having full knowledge of the needs and requirements of plaintiff in the matter of bottling its beer, and plaintiff having made known to defendant the particular purposes for which said machinery was required, defendant did recommend to plaintiff the purchase of the following described machinery:

- 1 #516 Qt. Meyer Dumore Bottle Cleaner complete with motor and continuous soaker drive, 1840 bottles immersed,
- 1 40 valve Meyer Dumore Filler,
- 1 #1050 Meyer Cataract Pasteurizer,

and represented that said machinery was reasonably fit for the particular purpose for which the same was required by plaintiff.

Whereupon, plaintiff did, on or about the 14th day of February, 1938, enter into an agreement with defendant, whereby plaintiff agreed to purchase from defendant, and defendant agreed to sell to plaintiff, the machinery above described for the total purchase price of Fifty-two Thousand, Seven, Hundred (\$52,700.00) Dollars, payable Thirty-five Hundred (\$3500.00) Dollars down payment in cash, and the balance in monthly payments until the full purchase price was paid. [27]

V.

That at the time of the execution of the aforesaid contract of sale by the parties thereto, plaintiff had no knowledge whatsoever of the quality and fitness of said machinery to perform the work and services required by plaintiff; that at the time of the execution of said agreement, defendant assumed to have knowledge, and through its agents stated and represented to plaintiff that said machinery would in a satisfactory manner perform and do all the things which plaintiff desired to have done and performed by reason of the purchase of said machinery.

That at the time of the purchase of said machinery, plaintiff relied solely upon the representations made as aforesaid by defendant to plaintiff, and the superior knowledge which defendant assumed to have concerning the quality and fitness of said machinery to do the work required by plaintiff.

That plaintiff would not have entered into said contract for the purchase of said machinery, had it known (as hereinafter alleged) that said machinery would not do and perform the work as warranted by the defendant.

VI.

That defendant shipped said machinery to plaintiff on or about April 27, 1938, and also furnished an engineer to supervise the installation and erection of said machinery in plaintiff's brewery plant.

That ever since such installation and erection said machinery has failed to work properly and has been totally unfit for the particular purposes for which the same was required to meet the needs and requirements of plaintiff.

That from May 6, 1938 to July 9, 1938, defendant's agents and employees consumed a period of three hundred and thirteen hours (313) in attempting to make said machinery work properly and in [28] accordance with defendant's representations.

That plaintiff continuously from time to time in the period from July 9, 1938 to March 20, 1940, notified and complained to defendant that said machinery was not working properly or in accordance with the representations made by defendant to plaintiff at the time of the purchase thereof.

That ever since the installation and erection of said machinery up to the time of the filing of plaintiff's complaint herein, defendant has assured plaintiff that said machinery would eventually work properly, and from about the 9th day of July, 1938 to about the time of the filing of plaintiff's complaint herein, has caused its agents and employees, without charge or expense to plaintiff, to endeavor to fix and adjust said machinery so that it would work properly and become reasonably fit for the needs and requirements of plaintiff in the bottling of its beer.

That plaintiff relied upon the assurances of defendant that said machinery would eventually be

made to work properly, in compliance with defendant's representations, and did not bring immediate suit upon the implied warranty arising from defendant's representations, by reason of said reliance.

That plaintiff has performed all the matters and things agreed by it to be performed under its contract with defendant.

VII.

That ever since the installation of said machinery, and almost daily, various parts thereof broke and became out of adjustment, thereby causing shut-downs in the operation of said machinery, and by reason of said shut-downs and the failure of said machinery to properly work, and by reason of the misrepresentations of defendant made to plaintiff and inducing it to purchase said machinery, plaintiff has suffered damages as follows:

1. That representation to plaintiff that only two (2) men would be required to load bottles into that [29] portion of the machinery known as the cleaner was false and untrue; ever since the installation of said machinery, it has been necessary for plaintiff to employ and pay an additional or third man to load bottles into the cleaner.

The representation made by the defendant that the cleaner was so constructed that it had an automatic unloader and thereby required no

one to supervise or control the clean bottles coming out of the cleaner was false and untrue; ever since the installation of the machinery, by reason of the bottles tipping or falling as they came out of the unloader, it was necessary for plaintiff at all times to employ an extra man to supervise the unloader end of the cleaner.

The representation of the defendant that said machinery was so constructed that no one was required at the take-off end of the pasteurizer was false and untrue; as the bottles came out of the pasteurizer at the take-off end thereof, the said bottles tipped to such an extent that it was, and at all times has been, necessary for plaintiff to employ a man to supervise and control said bottles as they came out of said pasteurizer.

That plaintiff, by reason of the foregoing, has been compelled to employ three (3) additional men for each shift in the operation of said machinery, and also a relief man for each regular crew of eleven (11) men; that the wages of said additional men per shift amounts to the sum of Twenty-Six Dollars and Twenty Cents (\$26.20); [30] that said machinery has been operated Six hundred and fifty-seven (657) shifts, and plaintiff has thereby suffered damage in the operation of said six hundred fifty-seven (657) shifts in the total sum and amount of Seventeen Thousand, Ninety-Five Dollars and Fourteen Cents (\$17,095.14).

Plaintiff further alleges that in the event that said machinery is in operation at the end of a period of five (5) years, from the date hereof, (in accordance with the defendant's representations as to the depreciation thereof), said machinery will have been operated for eight hundred and three (803) shifts, with three (3) additional men required, as hereinabove alleged, all to plaintiff's damage in the further sum of Twenty Thousand, Eight Hundred and Eighty-Three (\$20,883.00) Dollars.

2. The representation to plaintiff that that portion of the machinery known as the pasteurizer was self-cleaning, and that said pasteurizer was so constructed that all bottled beer passing through same would at all times be properly pasteurized, was false and untrue. Said pasteurizer is not self-cleaning by reason of the poor engineering and faulty construction of the machinery, (the details of which faulty construction and poor engineering are unknown to plaintiff,) the bottle labels, during the entire operation of said [31] machinery were, and are, carried over from the cleaner and closed up the holes on the copper spray pans, thereby preventing the proper pasteurization of the beer passing through the pasteurizer. Further, said pasteurizer is not self-cleaning in that during said pasteurization, a scale was and is deposited on the spray pans, which scale also closed the holes in the pans and prevented the

proper pasteurization of beer. Further, the recording thermometer, designed to record the condition of pasteurization of all bottles passing through the pasteurizer, failed to work properly for reasons unknown to this plaintiff.

That that portion of the machinery known as the soaker and cleaner failed, for reasons unknown to plaintiff, to work properly, and as a result thereof, the bottles came out of the filler with foreign matter contained therein, which thereafter caused the beer to become cloudy and unsalable.

That from about the 16th day of June, 1938 to the 16th day of February, 1940, a total of 699.24 barrels of beer had to be dumped, under Government supervision, for the reason that the same was not fit to drink and unsalable, due to the improper pasteurization thereof and the faulty cleansing of bottles, as hereinabove set forth. That the cost of said beer so dumped, exclusive of dumping labor, [32] amounted to the sum of Four Thousand, Six Hundred and Ninety-Six Dollars and Twenty-Five Cents (\$4,696.25), and thereby, by reason of the foregoing facts, plaintiff has been damaged in the sum of Four Thousand, Six Hundred and Ninety-Six Dollars and Twenty-Five Cents (\$4,696.25).

That the barrels of beer dumped as aforesaid, constituted beer that did not leave the brewery premises, for the reason that plaintiff

discovered that the same was spoiled before said beer was marketed.

That during said period of time, a total of five thousand, two hundred and ninety-one (5,291) cases of beer, that was not fit for beverage purposes and unsalable, by reason of the machinery's failing to properly pasteurize same, was without any knowledge on the part of plaintiff of the fact that said beer was spoiled and unfit for beverage purposes, released and marketed by plaintiff to various of its customers. That when plaintiff became aware of the fact that said beer was totally unfit for beverage purposes, plaintiff was compelled to replace the same, and thereby suffered a total loss of said five thousand, two hundred and ninety-one (5,291) cases of beer. That thereby, plaintiff suffered loss and damage in the sum of Seven Thousand, Six Hundred and Sixty-Seven Dollars and Thirty-Seven Cents (\$7,667.37). [33]

That plaintiff has not yet made adjustments for all of the cases of beer that went into the hands of the trade, and alleges that for the replacement of said spoiled beer, plaintiff will suffer loss and damage in the sum of One Thousand (\$1,000.00) Dollars.

3. That of the five thousand, two hundred and ninety-one (5,291) cases of spoiled beer that was sold by plaintiff to various of its customers, a large quantity thereof was resold to

consumers before the unfitness of said beer for beverage purposes was discovered. That unfavorable publicity was given to the beer manufactured by plaintiff, as a result of the spoiled beer getting into the hands of plaintiff's customers, and, in turn, the retail trade, to such an extent that plaintiff suffered a large decrease in the volume of its business, and thereby was damaged to the extent of the profits that it otherwise would have received had its volume of business been maintained. That the damage to plaintiff, caused by said loss of volume of business and profits that otherwise would have accrued to plaintiff, was and is the sum of Fifty Thousand, One Hundred and Ninety-Two (\$50,192.00) Dollars.

4. That the representation that said machinery would clean bottles with only a two and one-half ($2\frac{1}{2}\%$) percent solution of caustic soda was false and untrue. That said machinery, in fact, will not clean bottles at the speed of operation recommended by defendant with only a two and one-half ($2\frac{1}{2}\%$) percent solution of caustic soda, [34] and ever since the month of January, 1940, plaintiff has been compelled to use a six (6%) percent solution of caustic soda, in order to obtain clean bottles when said machinery is operated at the speeds recommended by defendant. That since January 1st, 1940, and up to the 30th day of September, 1940, said machinery has been operated two

hundred and four (204) shifts. That it was necessary to use a total of five hundred (500) pounds of caustic soda per shift to increase the solution from a two and one-half (2 1/2%) percent solution to a six (6%) percent solution. That the cost of the excess caustic soda used during said period to increase said solution to a six (6%) percent solution was Four Thousand, Five Hundred and Ninety (\$4,590.00) Dollars, and that by reason thereof, and by reason of the failure of said machinery to properly clean bottles with a two and one-half (2 1/2%) percent solution of caustic soda, plaintiff has been damaged in the sum of Four Thousand, Five Hundred and Ninety (\$4,590.00) Dollars.

That plaintiff, from the period beginning October 1, 1940, and ending June 30, 1943, will be further damaged in the sum of Fourteen Thousand, Seven Hundred and Ninety (\$14,790.00) Dollars, being the cost of the excess caustic soda plaintiff will be compelled to purchase in order to maintain a six (6%) percent solution for the purpose of cleaning the bottles passing through said machinery. [35]

5. That that portion of the said machinery known as the filler is unfit for the purpose of maintaining an exact filling level of beer in the bottles. That is to say, that the filler is so designed that instead of maintaining an exact beer filling level, more than the proper amount

of beer gets into the bottles than there should be, thereby causing a loss of beer to plaintiff. That when a shut-down in the machinery occurs, the beer in the filler becomes warm, so that when the machinery is started up again, the beer foams over and is wasted and the bottles thereby are not maintained in the proper filling level. That by reason of the foregoing and the loss of beer, plaintiff has, since the installation of said machinery, suffered damages thereby in the sum of One Thousand, Two Hundred, Sixty-Two Dollars and Sixty-Three Cents (\$1,262.63).

6. That the representation of defendant that said machinery had a long life and that the depreciation thereof did not exceed five (5%) percent to ten (10%) percent depreciation per annum was false and untrue. Plaintiff alleges that it will suffer damage by reason of excessive depreciation, based upon the life of the machinery for a period of five (5) years, in the sum or amount of Twenty Seven Thousand, Nine Hundred and Twenty (\$27,920.00) Dollars.

That since the purchase of said machinery, and by reason of the failure of the same to properly work, plaintiff has been compelled to purchase various parts to replace broken parts in said machinery of the value of Two Thousand, Seven Hundred and Twenty-Nine Dol-

lars and Ninety-Eight Cents, [36] (\$2,729.98), to plaintiff's damage in said amount.

That by reason of the fact that said machinery failed to work properly, plaintiff has been compelled to expend money for machinists and laborers in an endeavor to make said machinery properly work, to plaintiff's damage in the sum of Two Thousand, Five Hundred and Thirty-One Dollars and Twenty-Five Cents (\$2,531.25).

7. That ever since the installation of said machinery, and almost daily, said machinery became out of adjustment, thereby causing shut-downs in the operation thereof. Said machinery is so constructed that the soaker, cleaner and pasteurizer operate as a unit, and the failure of any of the said pieces of machinery to operate causes a shut-down of the entire unit. That plaintiff is unable to state in detail the cause of all of the shut-downs in the operation of said machinery, and is informed and believes, and upon such information and belief alleges, that defendant itself has been unable to determine what was wrong in some particulars with said machinery, resulting in its failure to work properly. That each and every shut-down occurring in the operation of said machinery has caused plaintiff to suffer damage in that the twenty-three (23) men required to operate said machinery could perform no

labor whatsoever during the period said machinery was shut-down, thereby causing a labor loss to plaintiff. That during the period commencing in the month of July, 1938, to the 17th day of September, 1940, the labor loss [37] and damage to plaintiff, caused by shut-downs and the failure of said machinery to properly work, amounted to the sum of Twenty-Six Thousand, Four Hundred and Fifty Eight Dollars and Sixteen Cents (\$26,458.16).

That plaintiff will suffer further damage for labor losses up to June 30, 1943, to be caused as aforesaid by the failure of such machinery to work properly, in the sum of Thirty-Two Thousand, Three Hundred and Forty (\$32,340.00) Dollars.

And for a further, separate and distinct second cause of action, plaintiff alleges as follows:

I.

Plaintiff hereby refers to Paragraphs I and II of its first cause of action, and by such reference incorporates said paragraphs in this, its second cause of action, the same as though said paragraphs were set out fully and at length herein.

II.

That heretofore, on the 14th day of February, 1940, plaintiff and defendant entered into an agreement in writing, whereby plaintiff agreed to pur-

chase from defendant, and defendant agreed to sell to plaintiff, the following described property:

1 #516 Qt. Meyer Dumore Bottle Cleaner,
complete with motor and continuous soaker
drive, 1840 bottles immersed,

1 40 valve Meyer Dumore Filler,

1 #1050 Meyer Cataract Pasteurizer,

for the total purchase price of Fifty-Two Thousand, Seven Hundred (\$52,700.00) Dollars, payable Thirty-Five Hundred (\$3500.00) Dollars down payment in cash, and the balance in monthly payments until the [38] full purchase price was paid.

III.

That at the time of the execution of the agreement aforesaid, defendant, in said agreement, warranted and guaranteed the proper working of the said machinery under reasonable operation thereof, according to defendant's instructions.

That at the time of the purchase of said machinery, plaintiff relied upon the warranty aforesaid and the superior knowledge which defendant assumed to have concerning the quality and fitness of said machinery to perform and do the work required by plaintiff.

IV.

That after the execution of the aforesaid agreement in writing, and on or about the 6th day of December, 1938, said contract in writing was changed and modified by the parties thereto, in

reference only to the time and manner of payments agreed to be made by plaintiff to defendant on account of the purchase price of said machinery; that at said time, except as in the particulars hereinbefore stated, the original contract in writing, dated February 14th, 1938, was reaffirmed and all of the terms and conditions thereof again agreed upon by said parties, and defendant did again warrant and guarantee to plaintiff the proper working of the machinery under reasonable operation thereof, according to the defendant's instructions.

V.

Plaintiff hereby refers to Paragraphs V, VI and VII of its first cause of action, and by such reference incorporates said paragraphs in this, its second cause of action, the same as though said paragraphs were set out fully and at length herein.

VI.

That at all times mentioned herein, plaintiff did reasonably operate said machinery in accordance with the defendant's [39] instructions, but that, as hereinbefore set forth, said machinery failed to work properly in breach of defendant's express warranty thereof, as hereinbefore alleged.

Wherefore, plaintiff prays judgment against said defendant for the sum of Two Hundred and Fourteen Thousand, One Hundred and Fifty-Five Dollars, and Seventy-Eight Cents, (\$214,155.78); for

its costs and disbursements in this action; and for such other and further relief as may be proper.

ALFRED F. MacDONALD

Attorney for Plaintiff

State of California,

County of Los Angeles—ss.

L. Stehlin, being by me first duly sworn, deposes and says: that she is the secretary of the plaintiff corporation, Monarch Brewing Company, in the above entitled action; that she has read the foregoing Amended Complaint and knows the contents thereof; and that the same is true of her own knowledge, except as the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

L. STEHLIN

Subscribed and sworn to before me this 2nd day of November, 1940.

(Seal)

CARL B. STURZENACKER

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 5, 1940. [40]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

Answering plaintiff's amended complaint herein defendant, George J. Meyer Manufacturing Company, a corporation, denies, avers and alleges as follows:

Answer to First Count (First Cause of Action) of Amended Complaint.

First Defense.

That the first count (first cause of action) set forth in said amended complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense.

That the right of action set forth in the first count (first cause of action) of said amended complaint did not accrue within two (2) years next before the commencement of this action, and is barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

Third Defense.

I.

Answering Paragraph III of the first count of said amended complaint defendant admits that plaintiff at the times mentioned [41] in said amended complaint was, and is now, engaged in the business of brewing, bottling and selling beer; admits that prior to the time of entering into the

contract hereinafter referred to, plaintiff used certain machinery for the bottling of its beer; alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments contained in said Paragraph III respecting said machinery, to-wit: that the operation of said machinery required the services of seventeen men, or that the maximum production of said machinery was fifteen hundred cases of eleven ounce steinie bottles per day, and that the cost of the bottling labor for each case of beer bottled by said machinery was nine cents per case; admits that prior to the 14th day of February, 1938, plaintiff informed defendant that plaintiff desired to acquire new machinery for bottling beer manufactured by plaintiff, and that defendant thereupon stated that defendant was a manufacturer of beer bottling machinery, including machinery described and sold under the trade names as follows:

No. 516 Qt. Meyer Dumore Bottle Cleaner,
complete with Motor and continuous Soaker
Drive 1840 bottles immersed;

40 Valve Meyer Dumore Filler; and

No. 1050 Meyer Cataract Pasteurizer;

denies that plaintiff prior to the 14th day of February, 1938, or at any other time, communicated to defendant any desire, other than that hereinabove alleged; alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to any of the desires plaintiff had as

alleged in said Paragraph III, other than its desire to acquire new machinery for bottling beer manufactured by plaintiff; denies that on or prior to the 14th [42] day of February, 1938, or at any other time, defendant made any of the representations averred in said Paragraph III, except the representation that defendant was a manufacturer of beer bottling machinery, including that described and having the trade names hereinabove set out.

II.

Answering Paragraph IV of the first count of said amended complaint, defendant denies each and every allegation therein contained, except as hereinafter alleged; alleges that on or about the 14th day of February, 1938, plaintiff and defendant made and entered into a certain written agreement, a true copy of which is hereunto annexed, marked Exhibit "A", and made a part hereof; for convenience in reference said agreement will be hereinafter referred to as "said contract Exhibit 'A'"; alleges that shortly thereafter, and prior to the shipment of any of the machinery described in said contract Exhibit "A", plaintiff informed defendant that it did not desire the Basement Extension described in said contract, and that such Basement Extension was not included in the machinery sold to plaintiff; alleges that "No. 516 Qt. Meyer-Dumore Bottle Cleaner", "40 Valve Meyer-Dumore Filler" and "Meyer Cataract Pasteurizer" were the respective trade names under which the machinery de-

scribed in said contract Exhibit "A" was sold; alleges that the net price of the machinery sold by defendant to plaintiff in and by said contract Exhibit "A" was Forty-one thousand eight hundred eighty and no/100 Dollars (\$41,880.00), and that said price was payable as in said contract provided, save and except that such method of payment was modified by the terms of that certain agreement executed by plaintiff and defendant on or about the 7th day of February, 1939, and dated December 6, 1938, a true copy of which agreement is hereunto annexed marked Exhibit "B" and [43] made a part hereof; for convenience in reference said last mentioned agreement will be hereinafter called "said contract Exhibit 'B'".

III.

Answering Paragraph V of the first count of said amended complaint, defendant denies each and every allegation therein made, except the allegation hereinafter quoted; alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegation contained in said Paragraph V reading:

"That plaintiff would not have entered into *said* for the purchase of said machinery, had it known (as hereinafter alleged) that said machinery would not do and perform the work as warranted by the defendant.";

denies that defendant warranted the machinery described in said contract Exhibit "A" otherwise

than in accordance with the guarantee set forth in said contract, and denies that said machinery at any time has failed to work in accordance with said guarantee.

IV.

Answering Paragraph VI of the first count of said amended complaint, defendant admits that on the 27th day of April, 1938, it shipped to plaintiff the machinery described in said contract, Exhibit "A" (exclusive of said Basement Extension) and furnished an engineer to supervise, and said engineer did supervise, the erection and installation of said machinery in plaintiff's brewery plant; denies each and every allegation made in said Paragraph VI, except as hereinabove expressly admitted; alleges that plaintiff has paid on account of the net purchase price of said machinery, to-wit: Forty-one thousand eight hundred eighty and no/100 Dollars (\$41,880.00), sums aggregating Thirty-three thousand four hundred [44] and no/100 Dollars (\$33,400.00) and no more, and that the balance of said purchase price, to-wit: Eight thousand four hundred eighty and no/100 Dollars (\$8,480.00), remains and now is unpaid from plaintiff to defendant, together with interest thereon at the rate of five per cent per annum from the 1st day of May, 1938.

V.

Answering Paragraph VII of the first count of said amended complaint defendant admits that fol-

lowing the installation of said machinery various parts thereof broke and became out of adjustment, thereby causing shut-downs in the operation of said machinery; alleges that said parts of said machinery broke and became out of adjustment because plaintiff failed to operate said machinery reasonably and in accordance with defendant's instructions, and defendant here refers to its Seventh Defense to said amended complaint hereinafter set forth and incorporates said Seventh Defense herein the same as if here set forth in full; except as hereinabove admitted or alleged, defendant denies each and every allegation contained in the following portion of said Paragraph VII:

“That ever since the installation of said machinery, and almost daily, various parts thereof broke and became out of adjustment, thereby causing shut-downs in the operation of said machinery, and by reason of said shut-downs and the failure of said machinery to properly work, and by reason of the misrepresentations of defendant made to plaintiff and inducing it to purchase said machinery, plaintiff has suffered damages as follows:”

(a) Answering subparagraph 1 of said Paragraph VII defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the following allegations: [45]

“that the wages of said additional men per shift amounts to the sum of Twenty-Six Dollars and Twenty Cents (\$26.20); that said machinery has been operated Six hundred and fifty-seven (657) shifts, and plaintiff has thereby suffered damage in the operation of said six hundred fifty-seven (657) shifts in the total sum and amount of Seventeen Thousand, Ninety-Five Dollars and Fourteen Cents (\$17,095.14).

“Plaintiff further alleges that in the event that said machinery is in operation at the end of a period of five (5) years, from the date hereof (in accordance with the defendant’s representations as to the depreciation thereof), said machinery will have been operated for eight hundred and three (803) shifts, with three (3) additional men required, as hereinabove alleged, all to plaintiff’s damage in the further sum of Twenty Thousand, Eight Hundred and Eighty-Three (\$20,883.00) Dollars.”

denies each and every other allegation contained in said subparagraph 1.

(b) Answering subparagraph 2 of said Paragraph VII defendant admits that the pasteurizer sold by defendant to plaintiff is not self-cleaning, and in this behalf alleges that said pasteurizer will not function properly unless it is thoroughly cleaned at frequent intervals, and particularly unless the holes in the spray pans on said pasteurizer are

kept free from any obstruction, particularly obstructions caused by lime and other minerals deposited from the water used in the operation of said pasteurizer; alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the following allegations contained in said subparagraph 2:

“That from about the 16th day of June, 1938 to the 16th day of February, 1940, a total of 699.24 barrels of beer had to be dumped, under Government supervision, for the reason that the same was not fit to drink and unsalable, due to the improper [46] pasteurization thereof and the faulty cleansing of bottles, as hereinabove set forth. That the cost of said beer so dumped, exclusive of dumping labor, amounted to the sum of Four Thousand, Six Hundred and Ninety-Six Dollars and Twenty-Five Cents (\$4,-696.25), and thereby, by reason of the foregoing facts, plaintiff has been damaged in the sum of Four Thousand, Six Hundred and Ninety-Six Dollars and Twenty-five Cents (\$4,-696.25).

“That the barrels of beer dumped as aforesaid, constituted beer that did not leave the brewery premises, for the reason that plaintiff discovered that the same was spoiled before said beer was marketed.

“That during said period of time, a total of five thousand, two hundred and ninety-one (5,291) cases of beer, that was not fit for bev-

erage purposes and unsalable, by reason of the machinery's failing to properly pasteurize same, was, without any knowledge on the part of plaintiff of the fact that said beer was spoiled and unfit for beverage purposes, released and marketed by plaintiff to various of its customers. That when plaintiff became aware of the fact that said beer was totally unfit for beverage purposes, plaintiff was compelled to replace the same, and thereby suffered a total loss of said five thousand, two hundred and ninety-one (5,291) cases of beer. That thereby, plaintiff suffered loss and damage in the sum of Seven Thousand, Six Hundred and Sixty-Seven Dollars and Thirty-Seven Cents (\$7,667.37).

“That plaintiff has not yet made adjustments for all of the cases of beer that went into the hands of the trade, and alleges that for the replacement of said spoiled beer, plaintiff will suffer loss and damage in the sum of One Thousand (\$1,000.00) Dollars.”

denies each and every other allegation contained in said subparagraph 2, except as hereinabove expressly admitted. [47]

(c) Answering subparagraph 3 of said Paragraph VII defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said subparagraph 3.

(d) Answering subparagraph 4 of said Paragraph VII defendant denies each and every allegation therein contained, except the allegations hereinafter quoted, and alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said subparagraph 4 reading as follows:

“That since January 1st, 1940, and up to the 30th day of September, 1940, said machinery has been operated two hundred and four (204) shifts. That it was necessary to use a total of five hundred (500) pounds of caustic soda per shift to increase the solution from a two and one-half ($2\frac{1}{2}\%$) percent solution to a six (6%) percent solution. That the cost of the excess caustic soda used during said period to increase said solution to a six (6%) per cent solution was Four Thousand, Five Hundred and Ninety (\$4,590.00) Dollars.”

(e) Answering subparagraph 5 of said Paragraph VII defendant denies each and every allegation therein contained, except the allegations hereinafter quoted, and alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said subparagraph 4 reading as follows:

“That when a shut-down in the machinery occurs, the beer in the filler becomes warm, so that when the machinery is started up again, the

of February, 1939, was dated December 6, 1938, and that a true copy thereof is hereunto annexed, marked Exhibit "B", and made a part hereof; that said agreement will be hereinafter referred to as "said contract Exhibit 'B'"; that neither at the time of its execution of said contract, Exhibit "B", nor at any time prior thereto did plaintiff notify or inform defendant that plaintiff claimed said machinery was not working properly or that it was defective or that there was a breach of defendant's guarantee set forth in said contract Exhibit "A", or that plaintiff claimed that defendant was chargeable with any other warranty or representation, expressed or implied, relating to said machinery, or that plaintiff claimed a breach of any such other warranty or representation; that defendant would not have executed said contract Exhibit "B" or otherwise extended the time for the payment of the unpaid balance of the purchase price of said machinery had it known that plaintiff claimed any damages by reason of any alleged breach [50] of said guarantee set forth in said contract Exhibit "A", or by reason of any breach of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery.

III.

That by reason of the premises plaintiff is estopped from claiming any breach of said guarantee set forth in said Exhibit "A", or the breach

of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery.

Fifth Defense.

I.

Defendant here refers to Paragraphs I and II of its foregoing Fourth Defense to the first count of said amended complaint, and by such reference incorporates said paragraphs herein the same as if here set forth in full.

II.

That by the execution of said contract Exhibit "B" the sale by defendant to plaintiff of the machinery described therein was ratified, approved and confirmed, on the terms set forth in said contract Exhibit "A", save and except as the terms for the payment of the unpaid balance of the purchase price of said machinery were modified by said contract Exhibit "B", and that by its execution of said contract Exhibit "B", plaintiff waived any and all claims and complaints that said machinery was defective or was not working properly or that there was any breach of defendant's guarantee set forth in said contract Exhibit "A", or any breach of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery. [51]

beer foams over and is wasted and the bottles thereby are not maintained in the proper filling level.” [48]

(f) Answering subparagraph 6 of said Paragraph VII defendant denies each and every allegation therein contained.

(g) Answering subparagraph 7 of said Paragraph VII defendant denies each and every allegation therein contained, except the allegations hereinafter quoted, and alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said subparagraph 7 reading as follows:

“That each and every shut-down occurring in the operation of said machinery has caused plaintiff to suffer damage in that the twenty-three (23) men required to operate said machinery could perform no labor whatsoever during the period said machinery was shut down, thereby causing a labor loss to plaintiff.”

Fourth Defense.

I.

That the installation in plaintiff's brewery plant of the machinery described in said contract Exhibit “A” was completed on or about the 9th day of June, 1938, and that plaintiff thereupon accepted said machinery and at all times thereafter plaintiff has been, and now is, using and operating said machinery; that plaintiff knew, or by the exercise of

reasonable diligence could have known, within a period of not more than thirty days following the installation of said machinery whether the same was defective and whether it failed to work properly in accordance with the guarantee set forth in said contract Exhibit "A", and whether it failed to perform the work for which it was designed and for which plaintiff purchased the same; that plaintiff paid each installment of the purchase price of said machinery as and when the same became due under said contract Exhibit "A" until said contract was modified [49] as hereinafter alleged.

II.

That in December 1938 after plaintiff had been continuously using and operating said machinery for more than five months, plaintiff requested defendant to extend the time stipulated in said contract Exhibit "A" for the payment of the unpaid balance of the purchase price of said machinery; that thereafter, and on or about the 7th day of February, 1939, defendant consented to an extension of time for the payment of said unpaid balance of the purchase price, and on or about said 7th day of February, 1939, plaintiff and defendant made and entered into a written agreement, whereby the terms of said contract Exhibit "A" were modified so as to enlarge the period for the payment of the unpaid balance of said purchase price; that said agreement so entered into on or about the 7th day

of February, 1939, was dated December 6, 1938, and that a true copy thereof is hereunto annexed, marked Exhibit "B", and made a part hereof; that said agreement will be hereinafter referred to as "said contract Exhibit 'B'"; that neither at the time of its execution of said contract, Exhibit "B", nor at any time prior thereto did plaintiff notify or inform defendant that plaintiff claimed said machinery was not working properly or that it was defective or that there was a breach of defendant's guarantee set forth in said contract Exhibit "A", or that plaintiff claimed that defendant was chargeable with any other warranty or representation, expressed or implied, relating to said machinery, or that plaintiff claimed a breach of any such other warranty or representation; that defendant would not have executed said contract Exhibit "B" or otherwise extended the time for the payment of the unpaid balance of the purchase price of said machinery had it known that plaintiff claimed any damages by reason of any alleged breach [50] of said guarantee set forth in said contract Exhibit "A", or by reason of any breach of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery.

III.

That by reason of the premises plaintiff is estopped from claiming any breach of said guarantee set forth in said Exhibit "A", or the breach

of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery.

Fifth Defense.

I.

Defendant here refers to Paragraphs I and II of its foregoing Fourth Defense to the first count of said amended complaint, and by such reference incorporates said paragraphs herein the same as if here set forth in full.

II.

That by the execution of said contract Exhibit "B" the sale by defendant to plaintiff of the machinery described therein was ratified, approved and confirmed, on the terms set forth in said contract Exhibit "A", save and except as the terms for the payment of the unpaid balance of the purchase price of said machinery were modified by said contract Exhibit "B", and that by its execution of said contract Exhibit "B", plaintiff waived any and all claims and complaints that said machinery was defective or was not working properly or that there was any breach of defendant's guarantee set forth in said contract Exhibit "A", or any breach of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery. [51]

Sixth Defense.

I.

That the installation in plaintiff's brewery plant of the machinery described in said contract Exhibit "A" was completed on or about the 9th day of June, 1938, and that plaintiff thereupon accepted said machinery and at all times thereafter plaintiff has been, and now is, using and operating said machinery; that plaintiff knew, or by the exercise of reasonable diligence could have known, within a period of not more than thirty days following the installation of said machinery whether the same was defective and whether it failed to work properly in accordance with the guarantee set forth in said contract Exhibit "A" and whether it failed to perform the work for which it was designed and for which plaintiff purchased the same.

II.

That plaintiff did not within a reasonable time after plaintiff knew, or by the exercise of reasonable diligence should have known, whether said machinery was defective and whether it failed to work properly in accordance with the guarantee set forth in said contract Exhibit "A", and whether said machinery failed to perform the work for which it was designed and for which plaintiff purchased the same, or at any time prior to the 24th day of February, 1939, give notice to defendant of any breach claimed by plaintiff of the guarantee set

forth in said contract Exhibit "A", or of any breach claimed by plaintiff of any other promise, representation or warranty, expressed or implied, alleged by plaintiff to have been made by defendant relating to said machinery.

Seventh Defense.

I.

That as aforesaid the installation in plaintiff's brewery [52] plant of the machinery described in said contract, Exhibit "A", was completed on or about the 9th day of June, 1938; that at the time of the installation of said machinery defendant gave plaintiff written and verbal instructions relative to the operation and maintenance of said machinery; that said machinery will not operate properly, and will become out of adjustment, unless it is operated reasonably and in accordance with said instructions, and defendant so stated to plaintiff at the time of installation of said machinery and from time to time thereafter; that included among the written instructions so given by defendant to plaintiff were those set forth in Exhibit "C" hereunto annexed and made a part hereof.

II.

That plaintiff did not follow said instructions set forth in said Exhibit "C" in the following, among other, respects:

1. That plaintiff failed to keep the soaking compartments of the bottle cleaner free from

old labels and other waste paper, and from time to time permitted said labels and waste paper to accumulate in said soaking compartments to the extent that the same clogged said bottle cleaner, thereby unreasonably increasing the drag or load upon the moving parts of said cleaner and causing them to become out of adjustment;

2. That plaintiff failed to keep the spindles, centering funnel bars, clamping funnels, funnel cups, supply jets and other parts of said bottle cleaner clean and free from lime and other minerals deposited thereon from the water used by plaintiff in its operations;

3. That plaintiff failed to keep the brushes on the bottle cleaner clean and failed to replace such brushes as the same became worn. [53]

4. That plaintiff failed to keep the pasteurizer clean and did not keep the perforations of the pans on the top of the pasteurizer free from lime and other minerals deposited thereon from the water used by plaintiff in its operations;

5. That plaintiff failed to keep the filler clean and free from sediment, and permitted the filling bowl and tubes to become clogged with sediment and dirt.

III.

That plaintiff changed the gears on the bottle cleaner so as to increase the speed thereof and

after such change of gears operated said bottle cleaner at an unreasonable speed, to-wit: at a speed higher than that at which said bottle cleaner was designed to operate.

IV.

That plaintiff failed to operate said machinery reasonably in that plaintiff permitted dirt, grime, sediment and lime, together with other mineral deposits from water, to accumulate on the operating parts of said machinery; that such accumulation of grime, dirt, lime and other mineral deposits placed a heavy and unreasonable load or drag on said machinery, and thereby prevented the moving parts thereof from functioning properly and caused some of such parts to break and others to become out of adjustment; that plaintiff continued to operate said machinery while so out of adjustment and that such operation of said machinery while out of adjustment further impaired the utility thereof.

V.

That any failure of said machinery to work properly and any breakage or maladjustment of any parts thereof were caused solely and exclusively by reason of plaintiff's failure, as hereinabove alleged, to maintain and operate said machinery reasonably and in [54] accordance with defendant's instructions.

Eighth Defense.

That all and singular the damages alleged in plaintiff's amended complaint are special damages

claimed to have been sustained as a consequence of the operation of said machinery, and that in and by the terms of said contract, Exhibit "A", it is expressly provided that defendant shall not be liable for any such special or consequential damages. [55]

**Answer to Second Count (Second Cause of Action)
of Amended Complaint**

First Defense.

That the second count (second cause of action) set forth in said amended complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense.

That the right of action set forth in the second count (second cause of action) of said amended complaint did not accrue within two (2) years next before the commencement of this action, and is barred by the provisions of Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

Third Defense.

I.

Answering Paragraph II of said second count of said amended complaint defendant denies each and every allegation therein contained, except as hereinafter alleged; alleges that on or about the 14th day of February, 1938, plaintiff and defendant made and entered into a certain written agree-

ment, a true copy of which is hereunto annexed, marked Exhibit "A" and made a part hereof; for convenience in reference said agreement will be hereinafter referred to as "said contract Exhibit 'A' "; alleges that shortly thereafter and prior to the shipment of any of the machinery described in said contract Exhibit "A", plaintiff informed defendant that it did not desire the Basement Extension described in said contract Exhibit "A", and that such Basement Extension was not included in the machinery sold to plaintiff; alleges that "No. 516 Qt. Meyer-Dumore Bottle Cleaner", "40 Valve Meyer-Dumore Filler" and "Meyer Cataract Pasteurizer" were the respective trade names under which the machinery described in said contract Exhibit "A" was sold; alleges that the net price of the machinery sold to plaintiff by defendant under [56] the terms of said contract Exhibit "A" was Forty-one thousand eight hundred eighty and no/100 (\$41,880.00), and that said purchase price was payable as in said contract provided, save and except that such method of payment was modified by the terms of that certain agreement executed by plaintiff and defendant on or about the 7th day of February, 1939, and dated December 6, 1938, a true copy of which agreement is hereunto annexed marked Exhibit "B" and made a part hereof; for convenience in reference said last mentioned agreement will be hereinafter called "said contract Exhibit 'B' ".

II.

Answering Paragraph III of the second count of said amended complaint defendant denies each and every allegation therein contained, except that defendant admits it made the guarantee set forth in said contract, Exhibit "A".

III.

Answering Paragraph IV of the second count of said amended complaint defendant denies each and every allegation therein contained, except as hereinafter alleged; alleges that on or about the 7th day of February, 1939, plaintiff and defendant executed said contract Exhibit "B".

IV.

Answering Paragraph V of the second count of said amended complaint defendant here refers to Paragraphs III, IV and V of the Third Defense of its foregoing answer to the first count set out in said amended complaint and by such reference incorporates said Paragraphs herein the same as if here set forth in full.

V.

Answering Paragraph VI of the second count of said amended complaint defendant denies each and every allegation therein contained; defendant here refers to the Seventh Defense of its fore- [57]
going answer to the first count set out in said amended complaint and by such reference incorpo-

rates said Seventh Defense herein the same as if here set forth in full.

Fourth Defense.

Defendant here refers to the Fourth Defense of its foregoing answer to the first count set forth in said amended complaint and by such reference incorporates said Fourth Defense herein the same as if here set forth in full.

Fifth Defense.

Defendant here refers to the Fifth Defense of its foregoing answer to the first count set forth in said amended complaint and by such reference incorporates said Fifth Defense herein the same as if here set forth in full.

Sixth Defense.

Defendant here refers to the Sixth Defense of its foregoing answer to the first count set forth in said amended complaint and by such reference incorporates said Sixth Defense herein the same as if here set forth in full.

Seventh Defense.

Defendant here refers to the Eighth Defense of its foregoing answer to the first count set forth in said amended complaint and by such reference incorporates said Eighth Defense herein the same as if here set forth in full. [58]

COUNTERCLAIM

Plaintiff owes defendant Two thousand three hundred three and 89/100 Dollars (\$2,303.89), according to the account, copy of which is hereunto annexed, marked Exhibit "D" and made a part hereof.

Wherefore, defendant prays that plaintiff take nothing by its complaint and that defendant have judgment against plaintiff for the sum of Two thousand three hundred three and 89/100 Dollars (\$2,303.89), together with interest thereon at the rate of seven per cent (7%) per annum from the date of the filing of this answer, for defendant's costs of suit herein and for such other and further relief as may be meet and proper in the premises.

LAWLER, FELIX & HALL,

MAX FELIX,

WILLIAM T. COFFIN,

By WILLIAM T. COFFIN,

Attorneys for Defendant.

[59]

EXHIBIT "A"

[Printer's Note: Exhibit "A" is identical with Exhibit "A" attached to the Complaint set out at page 8 of this printed record and is here omitted to avoid duplication.]

CITY Los Angeles County Los Angeles State Calif. Date 1932 Dec. 6
Geo. J. Meyer Manufacturing Co., a Corporation, Cudahy, Wis., (Seller) SHIP as follows:
 (Suburb of Milwaukee)

on or about subject to strikes, accidents manufacturing con-
 tingencies and other delays beyond your control

(BUYER)

March Drowing Co. City Los Angeles, Calif. LIST PRICE OF ALL ITEMS
 Street 1350 N. Main St. FOR CARS FACTORY CUDAHY
 ONLY THE GOODS AS SPECIFIED IN DETAIL BELOW—VERBAL UNDERSTANDINGS ARE NOT BINDING UNLESS SPECIFIED IN THIS CONTRACT

ITEM	DESCRIPTION	VALUE	CREDITS	NET PRICE	TERMS	TITLE	GUARANTEE	ERECTION	REMARKS
B1205	1 4516 Qt. Meyer Dumore Bottle Cleaner Complete with motor and continuous soaker drive 1840 bottles immersed								
HP710	1 40 Valve Meyer Dumore Filler								
6565	1 121 Dumore Extenslon								
35922A	1 1030 Merer Cateact Pasteurizer								
	Mecassar Bottle Conveyor								
	This agreement is made without prejudice and any rights or claims under our conditions of sale contract until the full settlement of this purchase price when all rights are to be returned from record will be furnished if the purchaser refers to the contract and the agreement signed by the party to be bound to the company and freight and freight total \$								
	CO. Bottle Conveyor @ \$12.00 / ft ———— Angle Brkts @ \$75 ———— Drives @ \$150 ———— Thermostats @ (Electric \$50.00 each Steam or Air @ 80.00 each)								
	At a Total Value of								

Traded-in machinery, including all parts, to be removed, stored, and loaded in cars by Buyer. Discount forfeited if payments defaulted.

In consideration of which BUYER agrees to pay SELLER total net cash as follows:

Cash with order					
Cash on B. L. or when ready to ship					
Cash on Installation					
Monthly Payments of \$1000.00 (due 12/1/32)					
" " " 500.00					
" " " 750.00					
" " " 140.00					
" " " 1450.00					

Title to above goods to remain in Seller until purchase price has been fully paid in cash. Buyer to sign notes, not in payment but as evidence of obligation and all other papers necessary to place this contract on record, furnish such waivers, papers and security as requested, keep property fully insured; policies payable as interests appear and pay all taxes. It is expressly agreed said property shall in no event become a fixture or part of realty. If Buyer should default in any payment, attempt to sell, mortgage or remove property without Seller's written consent, or become insolvent or in any manner jeopardize Seller's interest in property, then all payments become immediately due and payable and Seller or his agent without notice or process of law, may enter our premises, make any necessary openings in building and remove property, Buyer to pay all expenses made necessary by default, in which case Seller has the option to consider all payments made as rental or liquidated damages, and charge a reasonable rental for in default until goods are repossessed.

SELLER guarantees the proper working of goods sold under reasonable operation thereof, according to Seller's instructions, and agrees to issue full credit for all parts of its manufacture, returned F. O. B. factory within () years from date of shipment, which in Seller's opinion are defective or worn out through normal use. Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods. This guarantee does not apply to brushes, brush tubes, electrical equipment, gauges, instruments or procurable commercial parts.

BUYER to furnish sample bottles, foundations, openings in building, place machines and connect steam, water and electric lines to headers, all wiring changes; all labor required; and pay costs if engineers are detained or recalled through Buyer's fault.

Seller () furnish engineer to supervise erection and service total _____ hours.

Vandee or Buyer hereby acknowledges having received a full, true and complete copy of the foregoing contract _____
 1932 — February 7th
Geo. J. MEYER MANUFACTURING CO. (BUYER)

By Howard W. Kontsehl (SELLER)
 FOR BUYER
 By J. L. Lanning (BUYER)
 WITNESS
 FOR SELLER
 WITNESS

SALESMAN

All contracts subject to approval by an officer of seller corporation at home office; not subject to cancellation. TWO WITNESSES DESIRED

EXHIBIT "C"

I.

Instructions for Operating the
Meyer-Dumore Bottle Cleaner.

Cleaning Tanks:

The frequency of cleaning depends a great deal on the size of labels and amount of labels, and also somewhat on the kind of paste used. The only reason for cleaning is to remove labels and dirt, and as caustic soda is expensive, the solution should be used as long as possible without cleaning. Individual experience will best determine this. In general, the first three compartments should be cleaned every 48 to 60 hours run, and the fourth compartment or fresh water tank should be cleaned daily.

Outside Brushing Mechanism:

This device is intended to lift the bottles out of the carriers, revolve them and raise them between two brushes which scrub the bottle downward while they are going up and down, with a spray of water to assist in removing any dirt or particles of labels which remain on the bottles. It is very important that this water used for the outside brushes and the first rinse is not colder than 80° F. nor warmer than 90° F. This water is preheated in the space between the two last compartments and also by a mixing column which has a long valve stem that regulates the steam supply by expansion and contraction.

The spindles should turn and slide freely through

the lifter spindle guide and should be kept free from any deposit which should cause them to stick. The centering funnel bar above these spindles should also be kept free from dirt and scale so that all bottles will slide down easily. In case bottles are found on [72] top of the carriers at any time, this is caused by trouble at this point. The brushes also should be kept revolving rapidly so as to bring down the bottles and prevent them hanging up as would be the case if the brushes remain standing. The outside brushes should be adjusted so as to scrub the bottles thoroughly, and should be replaced every six months or a year, as they wear out.

All supply jets and rinsers and outside brushes must be kept clean.

Bottle lifter spindles must be kept free of lime and also free of oil or grease of any kind.

Inside Brushing Mechanism:

On the brushing mechanism, the glass should not be permitted to remain in the funnel cups and a stick should be kept handy to jar down the funnel cups from the top when a brush or a bottle breaks so that all the particles of glass will be jarred out. Any particle of glass remaining in funnel cup is bound to injure the brush, bottle or tube.

Labels and other dirt should be kept away from centering funnels and at the bottle lifting device so as to permit the proper centering of the bottles.

Examine brushes daily and replace worn or cut brushes. Greasy brushes indicate too weak a solu-

tion; wash with soap powder. See that water passage is clear through brush tips.

Funnel cups must be kept free of lime and work freely. If lime accumulates, use muriatic acid to remove.

Rinsing Device:

When the machine is first started there is usually more or less dirt and scale in the pipes which obstruct the holes near the ends of the pipes. Plugs are provided here which should be removed occasionally until this scale and dirt is [73] eliminated and a small wire should be kept convenient to make sure that all openings are clear. All rinsers are made visible so that an attendant can easily see whether each and every stream is operating properly.

There should be at least 15 pounds water pressure on the rinsing line and if this pressure is not available a booster pump should be used.

In case the water supply is not clean or is likely to cause frequent obstructions, a strainer or fish trap or some other form of filter should be provided.

All supply jets and rinsers and outside brushes must be kept clean. [74]

II.

Instructions for Operating the Meyer Cataract Pasteurizer.

When your machine was built, the interior was given a primer coat of a special aluminum paint

with a Bakelite base and a second coat of Tropelite. This coating is not attacked by acid or alkali and is used to prevent the tank and other parts from rusting. When this coating becomes damaged and rust spots show up, it is advisable to wire brush and clean these spots down to clean metal and patch these spots with aluminum paint and Tropelite. It would be good insurance to give the entire machine a complete cleaning and paint job each year. This applies especially to the interior. Our reason for using the aluminum paint for primer is that it brightens the interior, otherwise the regular A.C.B. primer for Tropelite can be used.

While the spray pans are punched with self-cleaning holes, they should be cleaned after each run and thoroughly brushed to remove all sediment. We formerly used small trap doors in pans to clean out sediment. We discontinued these so all sediment is removed from machine so it would not be re-pumped into pans.

After one week of operation the tank should be drained and cleaned thoroughly. The hand hole covers in pump trough or canal should be removed and trough thoroughly cleaned and hosed out. [75]

III.

Instructions for Operating Meyer-Dumore Filler.

Cleaning After Running on Beer:

After completion of the day's run the machine should be thoroughly cleaned. Remove the nuts hold-

ing the bowl cover in place and remove the cover using the lift mechanism supplied for this purpose. Thoroughly wash out the bowl using plenty of cold water permitting the water to drain out thru the liquid supply line. After this has drained for several minutes, close the beer cock filling up the bowl to the top. Then move all valve levers to the open position permitting the water to drain out thru all the valves, both thru the liquid valves and thru the charge valves, supplying sufficient water to maintain the level above the charge valves. Allow water to drain for at least five minutes.

Next attach the snift valve cleaner fitting to the cold water hose and apply to each of the snifts, in turn allowing the water to flush thru for at least 1 minute.

The gauge lines on the bowl pressure and line pressure gauge are supplied with cleanout fittings so that beer trapped in the gauge lines can be flushed out. This can be conveniently done by applying the snift cleaning fitting to these cleanout fittings, again using cold water.

Attach snift valve cleaner to hose and clamp in position on each stirrup the same as bottle, and open up valve, flushing water backward thru screen and beer valve.

Possible Operating Difficulties and Their Remedy:

1. Liquid does not flow into bottles properly (all valves performing similarly). [76]

(a) Check liquid level in bowl. An extremely high level in the bowl or an extremely low level will cause slow filling or complete failure to flow.

2. Rate of filling varies on different valves.

(a) Accumulating of filter mass or other foreign material on the valve screen may restrict the flow of liquid thru the valve.

(b) Valve lever shaft or inside operating lever may have been bent thru abuse or mishandling so that bottle may not be charged properly or so that valve shifter when properly adjusted for undamaged valves closes one valve too much. This defect will also be apparent in the "blow-off" making this particular valve fail to blow off.

3. Bottle foams when lowered from sealing rubber.

(a) This is usually due to a clogged snift valve. A clogged snift can be detected by watching the submerged end of the charge tube at the instant when snifting occurs. If the snift is open a few small bubbles will appear. If clogged apply snift cleaner fitting. If this does not clear passage remove nut, valve, and spring and clean with #60 drill. After using drill re-assembly and use snift cleaner fitting.

(b) Foaming is frequently caused by wild beer and excessive carbonation. The Meyer Dumore filler, due to the principle of filling, releases very little gas in the actual filling operation, so that somewhat less carbonation is nec-

essary on beer being filled on this filler than on beer [77] being filled on other fillers. A test of the finished bottled product should be made so that carbonation is reduced to the minimum which will give the desired volumetric gas content in the finished product.

4. One head fails to fill.

(a) Sealing rubber may be damaged so that proper seal cannot be made between bottle top and head. Under this condition counter-pressure will not be established.

5. One head fills bottles too high.

(a) A small leak in the sealing rubber joint, or snift valve will permit air to escape from bottle after the vent tube holes have been reached by the beer. This defect does not show up as a rule except if machine is shut down with the defective head having a bottle in place in the filling position.

6. Bowl floods.

(a) Usually due to insufficient pressure on gauge #2.

(b) Flooding of the bowl may result from stopping the machine either when the valve is in the "mid blow off position" or in the charge position with the power off at the instant when the valve lever is to press the electric latch. Either of these conditions will cause less counter-pressure and result in flooding the bowl.

7. Liquid level drops in bowl.

(a) This is usually due to gummy substance clog- [78] ging the relief valve opening. On machine equipped with the flood in the cover, the passage can easily be cleaned out by inserting a wire in the top opening of the pet cock. This is also a point that should be flushed with water at night and cleaned. [79]

EXHIBIT "D"

ACCOUNT OF GEO. J. MEYER MANUFACTURING CO.
with
MONARCH BREWING COMPANY.

Date.	Number.	Description.	Charges.	Credits.
1938.				
May 2	18051	PPD Frt chgs on HP719	138.05	
May 12	38929aS		260.00	
Jun. 8	40241aS		.57	
Jun. 22	40889aS		16.50	
July 7	41502aS		4.96	
July 15	41876aS		86.00	
July 16	Credit	7850RA your inv. 7/9/38 Coll. chg etc. Rec. exp.		6.35
Aug. 2	36317aS		15.87	
Aug. 9	43011aS		7.64	
Aug. 30	J6958	Trans. from temp sundry a/c in b/d cr 8003 8/3		.57
Sep. 7	44468aS		38.00	
Sep. 8	44531aS		3.60	
Sep. 26	45298aS		9.50	
Oct. 1	45296aS	9/27	.43	
Oct. 1	45415aS	9/30	32.53	
Oct. 7	Credit	8353RA 45298 B1205		9.50
Nov. 3	46788aS		85.33	
Nov. 9	Credit	8528RA Western Indust Engr 5/26/38 Inv. G676 forward		174.47
			<u>\$ 702.98</u>	<u>\$ 190.89</u>

George J. Meyer Mfg. Co.

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Date.	Number.	Description.	Charges.	Credits.
1938.		forward	\$ 702.98	\$ 190.89
Nov. 10	47911aS		70.74	
Nov. 12	46891aS		5.87	
Nov. 15	47107aS		15.00	
Nov. 18	47255aS		16.37	
Nov. 21	47353aS		4.50	
Dec. 1	47771aS		94.75	
Dec. 3	47858aS		9.33	
Dec. 23	48596aS		11.22	
1939.				
Jan. 18	49521aS		2.19	
Jan. 21	49667aS		2.00	
Jan. 27	Credit	8934RA allow inv. L.A. Automotive wks 6/22/38 B1205		12.00
Jan. 31	D/M6124	1/7 26 hrs welding at 2.50	65.00	
Feb. 2	Credit	8973RA 47353 B1205		4.50
Feb. 8	50347aS		15.87	
Feb. 28	Cash			384.70
Mar. 1	Credit	9119RA 36317 HP719		15.87
Mar. 3	51072aS		41.75	
Mar. 27	52182aS		1.99	
Apr. 6	52626aS		8.30	
Apr. 8	52732aS		4.05	
Apr. 12	52821aS		27.69	
Apr. 19	53199aS		21.00	
		forward	<hr/> \$1,120.60	<hr/> \$ 607.96
				[82]

Date.	Number.	Description.	Charges.	Credits.
1939.		forward	\$1,120.60	\$ 607.96
Apr. 25	53437aS		29.00	
Jun. 1	54406aS		Cancelled	
Jun. 9	37556A		94.00	
Jun. 13	55723aS		5.03	
Jun. 24	56344aS		67.20	
Jun. 26	56736aS		22.09	
Jun. 30	Credit	9885RA 55723 HP719		120.03
July 12	57163aS		7.39	
July 13	57262aS		12.00	
July 17	57534aS		.60	
July 21	57535aS		12.50	
July 25	58034aS		9.72	
July 26	58044aS		37.38	
July 18	37677A	Billed on 12723M		
July 3	37646A		40.31	
Aug. 2	58392aS		62.14	
Aug. 14	37781A		62.00	
Aug. 17	59206aS		38.79	
Aug. 23	59459aS		21.00	
Aug. 22	Cash			243.76
Aug. 24	59458aS		49.66	
Aug. 31	Cash & Disc. 78			38.79
Sep. 1	59803aS	8/31	2.00	
Sep. 14	60364aS		100.80	
Oct. 1	60594aS	9/27	Cancelled	
Oct. 7	61646aS		5.81	
		forward	\$1,800.02	\$1,010.54

[83]

Date.	Number.	Description.	Charges.	Credits.
1939.		forward	\$1,800.02	\$1,010.54
Nov. 11	63106aS		72.00	
Nov. 14	63178aS		3.88	
Nov. 17	63343aS		100.00	
Dec. 1	64137aS		38.25	
Dec. 9	64070aS	11/30	36.50	
Dec. 6	64340aS		22.00	
Dec. 21	64706aS		80.00	
Dec. 22	64282aS		33.78	
Dec. 22	64339aS		6.25	
Dec. 22	64701aS		30.00	
Dec. 23	64702aS		5.46	
1940.				
Jan. 17	65442aS		44.75	
Jan. 23	65912aS		30.23	
Feb. 1	66130aS	1/6	35.49	
Feb. 16	Credit	10930RA 13536 STS1s		60.75
Feb. 13	67097aS		7.80	
Feb. 22	67096aS		1.99	
Mar. 4	67540aS		5.00	
Mar. 20	Eng. Ser	685 DS AR CS7051	205.71	
Mar. 20	Eng. Ser	686 ABR CS7080	47.50	
Mar. 21	Eng. Ser	687 ABR CS7152	34.70	
Apr. 1	68902aS	3/13	22.00	
Apr. 2	69304aS		22.00	
Apr. 8	Credit	10313GR 63343GR		99.65
Apr. 9	69091aS		50.40	
		forward—	\$2,735.71	\$1,170.94
				[84]

Date.	Number.	Description.	Charges.	Credits.
1940.		forward—	\$2,735.71	\$1,170.94
Apr. 9	69092aS		3.90	
Apr. 9	69093aS		15.00	
Apr. 12	69270aS		10.68	
Apr. 8	69564aS		2.50	
Apr. 27	70016aS		22.28	
Apr. 30	Cash & Disc. 21			10.68
May 1	70513aS	4/29	103.60	
May 15	70390aS		101.75	
May 15	71109aS		61.62	
May 18	Eng. Ser	1150 GCS CS7075	200.00	
May 18	Eng. Ser	1151 ABR CS7212	33.46	
May 21	70618aS		103.05	
June 20	Eng. Ser	1264 ABR CS7441	12.98	
June 25	Cash			11.64
June 28	Cash			23.69
June 28	Cash COD			20.00
June 29	Cash COD			4.15
June 20	72592aS	COD	4.15	
June 20	72623aS	COD	20.00	
June 26	72869aS	COD	15.95	
July 1	73098aS	6/20	11.64	
July 1	73097aS	6/22	23.69	
July 10	73584		15.00	
July 9	Cash COD			15.95
Aug. 1	74996aS	7/15	11.00	
Aug. 1	73943aS	7/29 COD	93.25	
forward—			\$3,606.21	\$1,257.06

[85]

Date.	Number.	Description.	Charges.	Credits.
1940.		forward—	\$3,606.21	\$1,257.05
Aug. 1	Eng. Ser	1479ES CS7643 ABR	17.81	
Aug. 8	39074A	COD	60.00	
Aug. 9	74800aS	COD	201.50	
Aug. 13	Cash	COD		93.25
Aug. 20	Cash	COD		60.00
Aug. 29	Cash			201.50
Sep. 1	75770aS	8/29 COD	122.50	
Sep. 4	76451aS	COD	11.58	
Sep. 5	Eng. Ser.	1646ES CS7718 ABR	32.17	
Sep. 9	Cash			122.50
Sept. 13	Cash	COD		11.58
Sept. 28	77546aS	COD	58.00	
Oct. 7	77946aS	COD	68.00	
Oct. 7	Credit	121RA 71109AS HP719		2.00
Oct. 16	78055aS	COD	82.15	
Oct. 11	Cash	BC		58.00
Oct. 19	Cash	BC		68.00
Oct. 29	Cash	COD		82.15
			<u>\$4,259.92</u>	<u>\$1,956.03</u>
Total Charges			\$4,259.92	
Less Credits			1,956.03	
Balance Due			<u>\$2,303.89</u>	

[Endorsed]: Answer to amended complaint and counterclaim. Filed Jan. 31, 1941. [86]

[Title of District Court and Cause.]

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT.

Defendant moves the Court for summary judgment in its favor as to each and every claim as-

serted against defendant in and by plaintiff's amended complaint herein, on the following grounds:

1. That the pleadings on file, including plaintiff's original complaint, show there is no genuine issue as to the following material facts:

(a) The agreement between plaintiff and defendant relating to the machinery in question was reduced to writing and completely expressed in the written contract dated February 14, 1938, copy of which is annexed to plaintiff's original complaint as Exhibit "A" thereof, and further copy of which is annexed to defendant's answer to the amended complaint as Exhibit "A" thereof, as such contract was supplemented by the written agreement dated December 6, 1938, copy of which is annexed to defendant's answer to the amended complaint as Exhibit [88] "B" thereof;

(b) In both the original and supplemental contracts it is expressly provided that no verbal understanding is binding unless specified therein;

(c) It is further expressly provided in both the original and supplemental contracts that defendant shall not be liable for any damages or consequential damages incident to the operation of the machinery in question;

(d) The damages claimed to have been sustained by plaintiff, and itemized in plaintiff's amended complaint, are damages or consequen-

tial damages incident to the operation of the machinery in question.

2. That by virtue of the facts aforesaid, defendant is entitled as a matter of law to a judgment in its favor as to each and every claim asserted by plaintiff in its amended complaint herein.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN.
Attorneys for Defendant.

NOTICE OF HEARING OF MOTION.

To the Plaintiff above named, and to Alfred F. MacDonald, Esquire, its attorneys:

Please take notice that the undersigned will bring the foregoing motion on for hearing before this Court in Courtroom No. [89] 5 in the United States Post Office and Courthouse Building, Los Angeles, California, on the 25th day of August, 1941, at the hour of 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard.

Dated this 9th day of August, 1941.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN.
Attorneys for Defendant.

[Endorsed]: Filed Aug. 9, 1941. [90]

At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 8th day of October in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause having heretofore been submitted for decision on the motion of the defendant for summary judgment, the Court now enters the following order:

The motion of the defendant for summary judgment in its favor as to each and every claim asserted against the defendant by the plaintiff's Amended Complaint, filed August 9, 1941, heretofore argued and submitted, is now decided as follows:

The said motion is hereby granted upon the ground that by the terms of the contract of sale of the machinery, dated February 14, 1938, the plaintiff waived the damages it now seeks to recover.

[92]

[Title of District Court and Cause.]

MEMORANDUM DECISION

The Motion of the Defendant for summary judgment in its favor as to each and every claim asserted against the defendant by the plaintiff's Amended Complaint, filed August 9, 1941, heretofore argued and submitted, is now decided as follows:

The said motion is hereby granted upon the ground that by the terms of the contract of sale of the machinery, dated February 14, 1938, the plaintiff waived the damages it now seeks to recover.

The Court is of the view that the phrase "damages or consequential damages" in the waiver clause of the contract is used to cover all damages general or special, that might result in the "shipment, erection or the operation" of the machinery. (See, *Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co.*, 1911, 16 C. A. 198, 209; 25 C. J. S., *Damages*, #2, p. 455) To limit the waiver to the words "consequential damages", and, then, to interpret the words "consequential damages" as some condemnation cases do, (see cases below) as "those which are attributable to the interposition of some independent cause other than the acts of the defendant"—(to quote the language of counsel for plaintiffs in their last letter-memorandum)—would render the waiver clause meaningless. For, if consequential damages be those caused by other parties, no liability can attach to the defendant on account

of them. And, clearly, to interpret the contract of the parties as waiving damages for which the defendant would not, under any circumstances be liable,—they being caused by the acts of others,—would do violence [93] to the rule which bids us to interpret contracts so as to give them meaning rather than to make them meaningless. When parties contract, they do not protect themselves against liabilities which are not theirs, but which spring from the acts of others. They seek to avoid liability which would flow from their own acts. And so did the parties here. And neither the rule of ejusdem generis nor the special meaning given to the words “consequential damages” in some federal condemnation cases, such as *United States v. Chicago B & Q Ry. Co.*, 7 Cir., 1937, 90 F(2) 161, 166-169; *United States v. Chicago B & Q Ry. Co.*, 8 Cir., 1936, 82 F(2) 131, 136-137) call for an interpretation which would destroy entirely the meaning of the word “damages” as used in the waiver.

Hence the ruling above noted.

Dated this 8th day of October, 1941.

Appearances:

For the Plaintiff:

Alfred F. MacDonald and
Bodkin, Breslin & Luddy
Los Angeles, California

For the Defendant:

Lawler, Felix & Hall
Los Angeles, California

[Endorsed]: Filed Oct. 8, 1941. [94]

DOCKET—UNITED STATES DISTRICT COURT

Docket 1035-Y	Title of Case	Attorneys
		For Plaintiff:
	Monarch Brewing Com-	Alfred F. MacDonald
	pany, a corporation,	Bodkin, Breslin & Luddy
	vs	
	Geo. J. Meyer Manufac-	For Defendant:
	turing Co., a corpora-	Lawler, Felix & Hall
	tion	

Date	Filings-Proceedings
	ENTRY OF OCT. 8. 1941
Oct. 8 1941	Ent. order grtg. defts. mo. for summary judg-
	ment. Notified Attys. Fld. memo. decision.
	* * * * *
	ENTRY OF OCT. 13, 1941
Oct. 13, 1941	Fld. & ent. judgment pltf. take nothing & deft.
	have costs. D & I Judgt. Entered at C. O. B. 7,
	page 94. Notified Attys.
	* * * * *

[95]

In the District Court of the United States,
Southern District of California,
Central Division.
No. 1035-Y Civil.

MONARCH BREWING COMPANY, a corpora-
tion,

Plaintiff,

vs.

GEORGE J. MEYER MANUFACTURING
COMPANY, a corporation,

Defendant.

JUDGMENT ON PLAINTIFF'S CLAIMS.

The defendant, George J. Meyer Manufacturing Company, a corporation, having filed herein on the 9th day of August, 1941, its written motion for summary judgment in its favor as to each and every claim asserted against the defendant by the plaintiff, Monarch Brewing Company, a corporation, in and by plaintiff's amended complaint herein, and said motion having come on regularly for hearing before the above entitled Court and the Honorable Leon R. Yankwich, Judge thereof, on the 29th day of September, 1941, Alfred F. MacDonald, Esquire, and Messrs. Bodkin, Breslin & Luddy, by E. E. Hitchcock, Esquire, appearing for the plaintiff, and Messrs. Lawler, Felix & Hall, Max Felix, Esquire and William T. [96] Coffin, Esquire, by William T. Coffin, Esquire, appearing for the defendant, and photographic copies of the two written contracts between the plaintiff and the defendant, dated respectively February 14, 1938, and December 6, 1938, having been received in evidence pursuant to stipulation of counsel, and the Court, after hearing the arguments of counsel, having taken the matter under submission, and thereafter, being fully advised in the premises, having filed herein its memorandum decision, dated the 8th day of October, 1941, granting said motion:

It is, therefore, ordered, adjudged and decreed that the plaintiff take nothing by its action against the defendant, and that the defendant have and recover from the plaintiff defendant's costs herein, taxed in the sum of \$44.40.

Dated this 11th day of October, 1941.

LEON R. YANKWICH

United States District Judge.

Approved as to form in accordance with Rule 8,
this 10 day of October, 1941.

ALFRED F. MacDONALD,

BODKIN, BRESLIN & LUDDY,

By E. E. HITCHCOCK,

Attorneys for Plaintiff.

[Endorsed]: Judgment entered Oct. 13, 1941.
Docketed Oct. 14, 1941. Book 7, Page 94. R. S.
Zimmerman, Clerk, By Louis J. Somers, Deputy.
[97]

Receipt is acknowledged of copy of the within
Judgment On Plaintiff's Claims this 10th day of
October, 1941, at the hour of 11 A.M. of said day.

ALFRED F. MacDONALD,

BODKIN, BRESLIN & LUDDY.

By E. E. HITCHCOCK

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 13, 1941. [98]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Monarch Brewing
Company, a corporation, plaintiff in the above en-

titled action, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit, from the final judgment on plaintiff's claim, entered in this action on October 13, 1941.

Dated: January 13, 1942.

ALFRED F. MacDONALD

BODKIN, BRESLIN & LUDDY

By G. STUART SILLIMAN

Attorneys for Plaintiff.

[Endorsed]: Filed and mailed copy to Atty. for deft. Jan. 13, 1942. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy. [100]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the Plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment entered against it in said action, in said United States District Court, Southern District of California, Central Division, in favor of the Defendant in said action, on the 13th day of October, 1941.

Now, therefore, in consideration of the premises, and of such appeal, the undersigned, American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does

undertake and promise on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding the sum of two hundred fifty dollars (\$250.00), to which amount it acknowledges itself bound.

In witness whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at Los Angeles, California, by its duly authorized officers, this 13th day of January, 1942.

In case of a breach of any condition hereof, the above-entitled Court may, upon notice to said American Surety Company of New York, Surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said Surety is bound to pay on account of such breach and render judgment against said Surety and award execution therefor.

AMERICAN SURETY COMPANY
OF NEW YORK

By A. E. KRULL

Resident Vice President

Attest:

I. TAYLOR

Resident Assistant Secretary

10.00

State of California,
County of Los Angeles—ss.

On this 13th day of January, A. D. 1942, before me, Lucile M. Chesley, a Notary Public in and for

Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. E. Krull personally known to me to be the Resident Vice-President and I. Taylor personally known to me to be the Resident Assistant Secretary of the American Surety Company of New York, the Corporation described in and that executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] LUCILE M. CHESLEY

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 16, 1945.

[Endorsed]: Filed Jan. 13, 1942. [102]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON BY
PLAINTIFF ON APPEAL

I.

By virtue of the rule of ejusdem generis, the phrase "damages or consequential damages" contained in the waiver clause of the contract sued upon, the only damages waived by the terms of such clause are consequential damages, and the trial

court erred in failing to limit the waiver clause to such consequential damages.

II.

Consequential damages are those which are special rather than general, and are caused by the concurrence of some other event attributable to the same origin and cause, that is, attributable to the negligent act of defendant, so continuous in its nature that the concurrent wrongful act which precipitated the damage will not be deemed an independent wrong, but as conjoining with the original act of defendant in creating the disastrous result. Therefore the court erred in holding that the waiver clause in question waived claims for all recoverable damages.

III.

The court erred in failing to find that the parties had placed such a practical construction on the contract by their [103] conduct as to require the court to hold that the waiver contained in the contract would not bar plaintiff's action for the damages here sought to be recovered.

IV.

The plaintiff's action is not barred by the Statute of Limitations or laches, it having retained the machinery at defendant's request, in order to afford the defendant an opportunity to place the machinery in such working order as to comply with defendant's representations and plaintiff's requirements, and plaintiff having deferred the commence-

ment of its action in reliance upon defendant's representations that it would place the machinery in such working order as to comply with defendant's representations and plaintiff's requirements.

V.

Surrounding circumstances upon which an implied warranty is predicated may be shown by parol testimony notwithstanding the contract was reduced to writing and contained a statement that the parties were not bound by any verbal understanding, the contract not having contained a detailed statement of the warranty.

VI.

The waiver contained in the contract and relied upon by the defendant is repugnant to the preceding clause expressly guaranteeing the working of the machinery, and hence the former clause contained in the guaranty must be deemed to be controlling and the subsequent inconsistent waiver rejected.

Respectfully submitted,

ALFRED F. MacDONALD

BODKIN, BRESLIN & LUDDY

By G. STUART SILLIMAN

Attorneys for Plaintiff

[Endorsed]: Received copy of the within Statement of Points this 16th day of January, 1942.
/s/ Lawler, Felix & Hall, Attorneys for Defendant.
Filed Jan. 19, 1942. [104]

[Title of District Court and Cause.]

DESIGNATION OF PORTION OF RECORD
DESIRED BY PLAINTIFF ON APPEAL

To the Clerk of the Above Entitled Court:

Please prepare and certify Transcript of the Record on Appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, consisting of the following:

1. Plaintiff's Amended Complaint for damages for breach of warranty.
2. Answer to Amended Complaint.
3. Motion of defendant for summary judgment.
4. Memorandum Decision.
5. Judgment on plaintiff's claim.
6. Cost bond on appeal.
7. Statement of points relied upon by appellant.
8. Designation of portion of record desired by plaintiff on appeal.
9. Petition for Removal.
10. Bond on Removal.
11. Order on Removal.
12. Notice of appeal.

Dated: January 14, 1942.

ALFRED F. MacDONALD

BODKIN, BRESLIN & LUDDY

By G. STUART SILLIMAN

Attorneys for Plaintiff

[Endorsed]: Received copy of the within Designation of Portion of Record, etc. /s/ Lawler, Felix & Hall, Attorneys for Defendant. Filed Jan. 19, 1942. [105]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD TO BE INCLUDED IN RECORD ON APPEAL.

To the Clerk of the Above Entitled Court; to the Plaintiff and Appellant, Monarch Brewing Company, and to its Attorneys, Alfred F. MacDonald, Esquire, and Messrs. Bodkin, Breslin & Luddy:

Appellee, George J. Meyer Manufacturing Company, the defendant in the above entitled action, hereby designates the following portions of the record to be included in the Record on Appeal in said action, in addition to the portions of the record specified in "Designation Of Portion Of Record Desired By Plaintiff On Appeal," dated January 14, 1942, and filed herein by plaintiff and appellant on or about January 19, 1942: [106]

1. Plaintiff's original complaint.
2. Defendant's motion to dismiss.
3. The order of the Court granting the aforementioned motion to dismiss.
4. Copies of the two written contracts between plaintiff and defendant dated respectively February 14, 1938, and December 6, 1938, which copies were received in evidence at the hearing on September 29, 1941, of defendant's motion for summary judgment.
5. The order of the Court granting defendant's motion for summary judgment.

6. That portion of the Civil Docket in this action showing entry on October 8, 1941, of the said order of the Court granting the defendant's motion for summary judgment.

7. This application.

Dated this 20th day of January, 1942.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN,
Attorneys for defendant and
appellee, George J. Meyer
Manufacturing Company.

[Endorsed]: Received copy of the *with* Designation this 20th day of January 1942. Alfred F. MacDonald and Bodkin, Breslin & Luddy, by H. Talbot Attorney for plaintiff and appellant. Filed Jan. 20, 1942. [107]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111 inclusive contain full, true and correct copies of: Complaint; Petition for Removal; Bond on Removal; Order of Removal; Certificate of Clerk to Record of Superior Court; Motion to Dismiss and for More Definite

Statement and for Bill of Particulars; Order Granting Motion to Dismiss; Amended Complaint; Answer to Amended Complaint; Motion of Defendant for Summary Judgment; Order Granting Motion for Summary Judgment; Memorandum Decision; Docket Entry of Judgment; Judgment on Plaintiff's Claims; Notice of Appeal; Bond for Costs on Appeal; Statement of Points; Appellant's Designation of Record on Appeal; Appellee's Designation of Additional Record; and Three Copies of Contract Admitted in Evidence, which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$15.65, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 16th day of February, A. D. 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH,

Deputy.

[Endorsed]: No. 10056. United States Circuit Court of Appeals for the Ninth Circuit. Monarch Brewing Company, a corporation, Appellant, vs. George J. Meyer Manufacturing Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 18, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
Circuit No.

No. 10056

MONARCH BREWING COMPANY, a corpora-
tion,

Plaintiff and Appellant,

vs.

GEORGE J. MEYER MANUFACTURING
COMPANY, a corporation,
Defendant and Appellee.

STATEMENT OF POINTS RELIED UPON
AND DESIGNATION OF RECORD ON AP-
PEAL REQUIRED BY RULE 19-(6) OF
RULES OF CIRCUIT COURT OF AP-
PEALS.

Comes now plaintiff and appellant Monarch Brewing Company and for statement of points relied upon upon appeal refers to and adopts the "Statement of Points Relied Upon By Plaintiff On Appeal", heretofore filed in this case by plaintiff in the United States District Court, Southern District of California, Central Division, and for designation of record on appeal refers to and adopts the "Designation of Portion of Record Desired by Plaintiff on Appeal", heretofore filed in this case by plaintiff, in the United States District Court, Southern District of California, Central Division,

and considers all of the items mentioned in said designation as necessary for the consideration of this appeal.

Dated: February 14, 1942.

ALFRED E. MacDONALD

BODKIN, BRESLIN & LUDDY

By G. STUART SILLIMAN

Attorneys for Plaintiff and
Appellant

Received copy of the within this 16th day of February, 1942.

LAWLER, FELIX & HALL

Attorneys for Plaintiff

[Endorsed]: Filed Feb. 18, 1942. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF RECORD
DEEMED MATERIAL TO CONSIDERA-
TION OF APPEAL.

To the Clerk of the Above Entitled Court, to Plain-
tiff and Appellant, Monarch Brewing Company,
and to its Attorneys, Alfred F. MacDonald, Es-
quire, and Messrs. Bodkin, Breslin & Luddy:

Defendant and appellee, George J. Meyer Manu-
facturing Company hereby designates the following
portions of the record, deemed by appellee to be

material to the consideration of the appeal herein, in addition to the portions of the record designated in the "Statement Of Points Relied Upon And Designation Of Record On Appeal Required By Rule 19-(6) Of Rules Of Circuit Court Of Appeals" dated February 14, 1942, and filed herein by plaintiff and appellant, Monarch Brewing Company, on or about February 18, 1942:

1. Plaintiff's original complaint.
2. Defendant's motion to dismiss.
3. The order of the District Court granting the aforesaid motion to dismiss.
4. Copies of the two written contracts between plaintiff and defendant dated respectively February 14, 1938 and December 6, 1938, which copies were received in evidence at the hearing before the District Court on September 29, 1941, of defendant's motion for summary judgment.
5. The order of the District Court granting defendant's motion for summary judgment.
6. That portion of the Civil Docket in the District Court pertaining to this action showing the entry on October 8, 1941, of the said order of the District Court granting defendant's motion for summary judgment.
7. Appellee's Designation Of Additional Portions Of Record To Be Included In Record On Appeal filed by appellee in the District Court January 20, 1942.
8. The aforesaid "Statement Of Points Relied Upon And Designation Of Record On Appeal Re-

quired By Rule 19-(6) Of Rules Of Circuit Court Of Appeals'', dated February 14, 1942, and filed herein by plaintiff and appellant on or about February 18, 1942.

9. This designation.

Dated this 20th day of February, 1942.

LAWLER, FELIX & HALL,
OSCAR LAWLER,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN

Attorneys for defendant and
appellee, George J. Meyer
Manufacturing Company.

Received two copies of the within Designation this 20th day of February, 1942.

ALFRED E. MacDONALD, BODKIN,
BRESLIN & LUDDY
By G. STUART SILLIMAN

Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed Feb. 21, 1942. Paul P. O'Brien, Clerk.

No. 10056

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,
Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

ALFRED F. MACDONALD,
505 Taft Building, Los Angeles,

BODKIN, BRESLIN & LUDDY,
1225 Citizens National Bank Building, Los Angeles,
Attorneys for Appellant.

FILED
APR 24 1932
PARKER & BAIRD, PRINTERS

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I.

By virtue of the rule of ejusdem generis the phrase, "damages" or "consequential damages" contained in the waiver clause of the contract sued upon, the only damages waived thereby were consequential damages and the court erred in failing to limit the waiver clause to such consequential damages	8
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II.

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No. 10056

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,
Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal by the plaintiff from a summary judgment for the defendant, in an action for damages, in the sum of \$214,155.78, for the breach of a warranty in respect to the quality, nature and fitness of certain bottling machinery to do certain work, the plaintiff being a corporation organized and existing under the laws of the State of California, and a citizen of the State of California, and the defendant being a corporation organized and existing under the laws of the State of Wisconsin, and being a resident of the State of Wisconsin.

Statement of the Facts Presented by the Pleadings.

Unless otherwise indicated references are to page numbers of the Transcript of Record.

This is an appeal by plaintiff from a judgment in favor of the defendant on plaintiff's claim entered pursuant to an order made granting defendant's motion for a summary judgment.

Plaintiff's amended complaint alleges that prior to February 14, 1938, plaintiff was using certain bottling machinery which required seventeen men to operate, the maximum production of which was 15-cases of 11-ounce Steinie bottles per day, at a cost of 9¢ per case, and that prior to February 14, 1938, plaintiff advises defendant that plaintiff was desirous of acquiring machinery which would increase plaintiff's daily bottling output over that turned out by the bottling machinery plaintiff then had, and at a reduced cost of operation. [Tr. p. 25.]

The amended complaint further alleges that defendant thereupon advised plaintiff that defendant was the manufacturer of certain bottling machinery, described as follows:

- 1 #516 Qt. Meyer Dumore Bottle Cleaner complete with motor and continuous soaker drive, 1840 bottles immersed,
- 1 40 valve Meyer Dumore Filler,
- 1 #1050 Meyer Cataract Pasteurizer. [Tr. p. 28];

which machinery, defendant represented to plaintiff, required 20-men to operate and would bottle 3600 cases

of 11-ounce Steinie bottles per day, at a cost of approximately $4\frac{1}{2}\phi$ per case [Tr. p. 26]; that defendant having full knowledge of plaintiff's requirements, recommended that plaintiff purchase the last above described machinery, and that thereupon plaintiff entered into a contract with defendant, dated February 14, 1938 [which contract is set forth in full at page 8 of the Transcript of Record], whereby plaintiff purchased and defendant sold the machinery described in the said contract, for a total of \$52,700.00. [Tr. p. 28.] That at the time of entering into said contract plaintiff had no knowledge of the quality, fitness or capacity of said machinery, and in entering into said contract plaintiff wholly relied upon the representations of the defendant as to the quality and fitness of such machinery to perform the work required by the plaintiff. [Tr. p. 29.]

Plaintiff's amended complaint consists of two causes of action. By the first cause of action plaintiff seeks to recover damages for breach of an implied warranty, in respect to the capacity, fitness and quality of the above described bottling machinery sold by defendant to plaintiff under the terms of said contract of February 14, 1938, which implied warranty is predicated upon the fact that plaintiff made known to defendant the purpose for which the machinery was required and relied upon defendant's judgment that the machinery would meet plaintiff's requirements.

It appears from the face of such contract that it was signed by the plaintiff in Los Angeles, California, February 14, 1938, and then mailed to the defendant and accepted by the defendant, by the signing thereof by its officers at Cudahy, Wis., on February 19, 1938.

The contract contains the following clauses:

“Only the goods as specified in detail below—
f.o.b. cars factory Cudahy. Verbal understandings
are not binding unless specified in this contract.”

* * * * *

“Seller guarantees the proper working of goods
sold under reasonable operation thereof, according
to Seller’s instructions, and agrees to issue full credit
for all parts of its manufacture, returned F.O. B.
factory within two years from date of shipment,
which in Seller’s opinion are defective or worn out
through normal use. Seller shall not be liable
for delays, damages or consequential damages, in
shipment, erection, or in operation of above goods.
This guarantee does not apply to brushes, brush
tubes, electrical equipment, gauges, instruments or
procurable commercial parts.” [Tr. p. 8.]

The gross selling price of the items set forth in
said contract is \$52,700.00. This amount was reduced
to a net of \$41,880.00, by reason of the deduction of
\$1120.00, because of plaintiff’s election not to purchase
the Basement Extension [Tr. pp. 46-47], and by reason
of the further deduction on account of a special dis-
count in the sum of \$9700.00. \$3500.00 was paid on
the contract upon the execution thereof, leaving a bal-
ance of \$38,380.00. On December 6, 1938 the contract
was modified as to the terms of the payment of the
then balance of \$28,380.00, by the signing of a sub-
sequent contract in Los Angeles by the plaintiff on De-

cember 6, 1938, and the acceptance, by the signing thereof by the defendants, at Cudahy, Wisconsin, on February 7, 1939. A copy of the last mentioned contract is attached to defendant's answer. [Tr. p. 67.]

Pursuant to said contract and the modification thereof, the machinery described in Exhibit "A", with the exception of the Basement Extension, was delivered by the defendant to a common carrier, F.O.B. cars, at Cudahy, Wisconsin, and transported by such common carrier to the plaintiff at Los Angeles, California. [Tr. p. 29.] Upon the machinery being received in Los Angeles, plaintiff caused the same to be put into place, under the supervision of an engineer furnished by defendant, and attempted to operate the same. [Tr. p. 29.] The machinery having failed to operate, as defendant represented it would, the plaintiff notified defendant, and the employees of defendant devoted 313 hours of labor in an unsuccessful attempt to place said machinery in proper working order, for which service the defendant made no additional charge against plaintiff. [Tr. p. 30.]

The amended complaint further alleges that plaintiff deferred commencement of action on the breach of the implied warranty because of its reliance upon defendant's repeated representations that defendant would eventually be able to make the machinery operate in a proper manner. [Tr. p. 31.]

The special damages resulting proximately, directly and solely from the breach of defendant's implied warranty, for which plaintiff seeks recovery by his first cause of action, in the sum of \$214,155.78, are set forth

in paragraph 7 of its amended complaint, and may be summarized as follows:

(a) Present and future wages of men necessary to operate said machinery in excess of the number of men represented to be necessary to operate the machinery, \$37,978.14

(b) The value of the beer lost by reason of the failure of the machinery to pasteurize the beer with the degree of efficiency with which defendant represented the machinery would pasteurize the beer, 13,363.62

(c) The loss of profits due to adverse publicity arising from the fact that some of the beer bottled by the machinery in question was not pasteurized with the degree of efficiency with which the defendant represented the machinery would pasteurize the beer, 50,192.00

(d) Loss of caustic soda used in operating the machinery, in excess of that which defendant said would be sufficient to enable the machinery to properly cleanse the bottles, 19,380.00

(e) The value of the beer lost due to failure of the machinery to maintain a proper filling level, in accordance with defendant's representations, 1,262.63

(f) The loss due to depreciation in excess of the rate of depreciation which defendant represented the machinery would have, 27,920.00

(g) Cost of replacing defective parts of the machinery, 5,261.23

(h) Labor costs expended and to be expended in endeavoring to put the machinery in good operating order and the value of labor lost resulting from temporary shut-downs, caused by failure of the machines to properly operate, 58,798.16

[Tr. pp. 31-40.]

Plaintiff's second cause of action is predicated upon breach of the express warranty and guaranty contained in the written terms of the contracts above referred to, which guaranty is hereinabove quoted. [Tr. pp. 40-43.]

Defendant, by its answer to plaintiff's amended complaint, has set up various defenses. However inasmuch as the sole question presented on this appeal is whether or not the defendant's motion for summary judgment was properly granted, that is, whether the amended complaint stated a cause of action, it is not necessary at this time to consider the various defenses alleged by defendant's answer.

The motion for summary judgment is based upon but two propositions:

1. Plaintiff's action is barred by the waiver of consequential damages contained in the contract;

2. Parol evidence will not be admissible on the trial of an action to establish implied warranty, because the contract provided "verbal understandings are not binding unless specified in this contract."

ARGUMENT.

I.

By Virtue of the Rule of *Ejusdem Generis* the Phrase, "Damages" or "Consequential Damages" Contained in the Waiver Clause of the Contract Sued Upon, the Only Damages Waived Thereby Were Consequential Damages and the Court Erred in Failing to Limit the Waiver Clause to Such Consequential Damages.

The clause of the contract in question reads:

"Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods. This guarantee does not apply to brushes, brush tubes, electrical equipment, gauges, instruments or procurable commercial parts."
[Tr. p. 8.]

It was the contention of the plaintiff upon the hearing of the motion for summary judgment in the trial court, that the clause in question only exempted the defendant from liability for consequential damages, caused by the concurrence of the acts of the defendant and some other event, and not for the direct damages here sought to be recovered, which were proximately and solely caused by the breach of the express and implied warranty sued upon.

On the other hand the defendant contended, and the trial court held, that if consequential damages were construed to mean those attributable to the interposition of

Specification of Errors.

Appellant Monarch Brewing Company hereby specifies the following errors of the trial court upon which it relies upon this appeal:

1. The Court erred in granting defendant's motion for summary judgment in its favor as to each and every claim asserted against defendant by plaintiff's amended complaint, filed August 9, 1941, which motion was granted October 8, 1941.

2. The Court erred in failing to hold, in accordance with the rule of *ejusdem generis*, that the waiver clause contained in the contract was limited to consequential damages.

3. The Court erred in holding that the waiver clause in question waived claims for all recoverable damages, and erred in failing to hold that the consequential damages waived by the terms of the contract were only those special damages which might be caused by the negligent act of the defendant, so continuous in its nature that the concurrent wrongful act which precipitated the damage would not be deemed an independent wrong, but as conjoining with the original act of defendant in creating the disastrous result.

4. The Court erred in failing to find that the parties had placed such a practical construction on the contract by their conduct as to require the Court to hold that the waiver contained in the contract would not bar the plaintiff's action for the damages here sought to be recovered.

5. The Court erred in failing to hold that plaintiff's action is not barred by the statute of limitation or laches, it having retained the machinery at defendant's request,

in order to afford defendant an opportunity to place the machinery in working order so as to comply with defendant's representations and plaintiff's requirements, the plaintiff having deferred commencement of its action in reliance upon defendant's representations that it would place the machinery in such working order as to comply with defendant's representations and plaintiff's requirements.

6. The Court erred in failing to hold that surrounding circumstances upon which an implicit warranty is predicated may be shown by parol testimony, notwithstanding the contract was reduced to writing and contained a statement that the parties were not bound by any verbal understanding, the contract not having contained a detailed statement of the warranty.

7. The Court erred in failing to hold that the alleged waiver of damages contained in the contract and relied upon by the defendant is repugnant to the preceeding clause expressly guaranteeing the working of the machinery, and hence the former clause containing the guaranty must be deemed to be controlling, and the subsequent inconsistent waiver rejected.

some independent clause, other than acts of the defendant, there would have been no necessity for inserting such provision in the contract.

At the outset it is to be noted that the term “consequential damages” is preceded by the words “damages or”. It is our contention that the general term “damages”, as thus used, is limited by the immediately following phrase “consequential damages”, to those damages of the latter class.

In the Matter of Petition of Johnson, 167 Cal. 145, defendant was charged with violation of *Section 593* of the *Penal Code*, which made it unlawful to interfere with wires used for the purpose of transmitting electricity for light, heat and power. Defendant contended that *Section 593* was repealed by the amendment in 1905 to *Section 591* of the *Penal Code*, which made it unlawful to interfere with any telephone or telegraph lines or any other lines used to conduct electricity. The court, in holding the amendment to *Section 591 Penal Code* did not repeal *Section 593 Penal Code*, because the clause “or any other line used to conduct electricity” under the rule of *ejusdem generis* must be limited in its application to wires of the same general nature, said at page 145:

“It is true that the words ‘or any other line used to conduct electricity’ might be interpreted in certain juxtapositions as referring to electric light and power lines. Used as they are in *Section 591*, following the enumeration of telephone and telegraph lines, they doubtless come within the rule of con-

struction known as *ejusdem generis* and refer to things of the same general nature as those specified. In such cases the particular words are inserted for the purpose of describing certain species and the general words to include other species of the same genus. The rule is founded upon the reason that if the general words are intended to prevail in their full and unrestricted sense the special words would not be employed by the lawmakers at all."

In *People v. Strickler*, 25 Cal. App. 60, defendant was charged with selling intoxicating liquor containing ninety-five hundredths of one per cent per volume of alcohol, which act the state contended constituted violation of the Wyllie Local Option Law, which defined alcoholic liquors as follows:

" 'The term "alcoholic liquors" as used in this act shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain one per cent by volume, or more, of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage.' "

It was contended by defendant that by virtue of the rule of *ejusdem generis* the only sale of spirituous, vinous or malt liquors which was prohibited by the statute was such as contained one per cent of alcohol, while the attorney general contended that the prohibition was not restricted to liquors containing alcohol. The appellate court sustained the defendant's contention, and in dis-

cussing the application of the rule of *ejusdem generis* to the facts presented in that case, said at page 65:

“In its practical application, this rule simply means that ‘general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general.’ ”

The court, in pointing out that the rule is applicable to the construction of contracts as well as to statutes, said at page 65:

“ ‘Where a statute *or other document* (italics ours) enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces ‘other’ persons or things, the word ‘other’ will generally be read as ‘other such like’, so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated.’ ”

In *Henne v. Summers*, 16 Cal. App. 67, the lessor under a five year lease brought an action against the surety on a bond executed by the lessee and the defendant Summers as surety, to secure the full performance of all obligations contained in said lease and also the payment of the last two months’ rent to become due and payable as therein specified. After one year the lessee’s assignee became bankrupt and the lessor leased the property to one Harris, resulting in an unpaid balance of \$2700.00, which would have accrued under the original lease. The defendant contended that the guarantee in so far as the payment of rent was concerned only applied

to the payment of the last two months' rent and that the condition of the bond in respect to the performance of all obligations contained in the lease referred to obligations other than the payment of rent. The court in sustaining this contention said, at page 71:

“It is settled law that to give effect to the intention of the parties, general words may be restrained by a particular recital which *follows* them, when such recital is used by way of limitation or restriction.”
(Italics ours.)

To the same effect see *Milwaukee County v. Badger Chair and Furniture Co.*, 269 N. W. 659, 223 Wis. 117.

In the present case the word “damages” contained in the clause under consideration is necessarily limited in its application by the following specific terms “consequential damages”.

Thus limited it becomes apparent that the exemption relied upon by defendant does not embrace all damages, but only embraces consequential damages.

It must be apparent from the definition of consequential damages, that the damages which were waived by the terms of the contract were those which might be caused by the concurrence of an act of the defendant with some other event, perhaps in the erection of the machinery, at plaintiff's plant, rather than the direct damages resulting solely from a breach of the warranty as to the capacity and fitness of the machinery.

II.

Consequential Damages Are Those Which Are Special Rather Than General, and Are Caused by the Concurrence of Some Other Event Attributable to the Same Origin and Cause, That Is, Attributable to the Negligent Act of Defendant, So Continuous in Its Nature That the Concurrent Wrongful Act Which Percipitated the Damage Will Not Be Deemed an Independent Wrong, but as Conjoining With the Original Act of Defendant in Creating the Disastrous Result. Therefore the Court Erred in Holding That the Waiver Clause in Question Waived Claims for All Recoverable Damages.

A waiver of claim for consequential damages does not waive a claim for damages caused without the concurrence of some other event such as the negligence of a third person, or the operation of natural forces, and the court erred in holding that a waiver of consequential damages must be deemed to be a waiver of all recoverable damages.

The measure of damages for breach of a contract is prescribed by *Section 3300, Civil Code*, which is as follows:

“For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.”

We believe that the most accurate definition of consequential damages is that found in *Loiseau v. Arp* (S. D.), 14 L. R. A. (N. S.) 853, in which plaintiff brought an action for possession of two colts belonging to plaintiff which defendant had taken possession of and held as security for damages alleged to have been inflicted upon a colt of the defendant by reason of being bitten by plaintiff's colts while trespassing on defendant's property. The evidence showed that the defendant's colt was injured while attempting to get over the fence. The court held the proximate cause of the injury to defendant's colt was his attempt to get over the fence rather than the fact that plaintiff's colts were unlawfully trespassing on defendant's property. The court, in pointing out the distinction between direct and consequential damages, said at page 858:

“ ‘Again, damages are either direct or consequential. The former are such as result from an act without the intervention of any intermediate controlling or self-efficient cause. The latter are such as are not produced without the concurrence of some other event attributable to the same origin or cause. Proximate damages are those that are the ordinary and natural results of the defendant's act, such as are usual, and might therefore have been expected.’ ”

A definition of consequential damages, as stated in *Loiseau v. Arp*, *supra*, is quoted with approval by the U. S. Circuit Court of Appeals, 7th Circuit (Wis.) in the case of *Christman v. United States*, 74 Fed. (2d) 112, at 114 and 115. In that case the plaintiff sought damages for the overflow of its land by reason of the construction and maintenance of a dam by the United States. It appears that the land was not overflowed solely by rea-

son of the erection and maintenance of the dam, but by reason of that fact, coupled with water coming down from freshets in the hills. In approving the definition of consequential damages as stated in the case of *Loiseau v. Arp, supra*, the court said at page 114:

“Such damages are those which do not arise as an immediate or natural and probable result of the act of the party, but as an incidental consequence. The courts have followed quite generally this definition. A well expressed statement is that in *Loiseau v. Arp*, 21 S. D. 566, 114 N. W. 701, 703, 14 L. R. (N. S.) 855, 130 A. St. Rep. 741, where the court said, ‘Damages are either direct or consequential. The former are such as result from an act without the intervention of any intermediate controlling or self efficient cause. The latter are such as are produced without the concurrence of some other event attributable to the same origin or cause.’ ”

The court further, in pointing out no recovery could be had because the flood was caused by the building of the dam, coupled with the freshets coming down from the hills, said at page 115:

“The line of demarcation between the *Sanguinetti* case and the *Cress* case is very narrow, but, apparently, to give effect to the two decisions, the court below was justified in saying that the damages here involved only an indirect result of the building of the dam and are the consequential result of that fact coupled with the intervention of other elements, the existence of which was not due to the building of the dam.”

Section 3911 of the Civil Code of Georgia, defines consequential damages as

“such as are the necessary and connected effect of the tortious act, though to some extent depending upon other circumstances.”

Dublin v. Ogburn, 82 S. E. 939, 142 Ga. 40.

It is our contention that the liability for damages, in respect to which it is sought by the contract here in question to exempt the defendant, was a liability for damages resulting from the continuing wrong of the defendant coupled with the concurrent negligent action of a third person, or the operation of natural forces which ultimately precipitated the damages. An example of such damages would be those arising from the concurrence of the negligence of the defendant in furnishing an independent contractor equipment, known by defendant to be defective, for use in erecting the machinery with the negligence of the independent contractor in using such defective equipment resulting in damage to the plaintiff.

The contract here in question was signed by the buyer in Los Angeles, California, February 14, 1938, and forwarded to the seller at Cudahy, Wisconsin, where it was signed by the officers of the defendant seller corporation, on February 19, 1938. By the terms of the contract the machinery was sold F. O. B. cars, factory, Cudahy, Wisconsin. [Tr. p. 8.] Accordingly, the goods were delivered by the seller to the common carrier at Cudahy, Wisconsin, and transported to Los Angeles. [Tr. p. 29.] The contract also provided that the buyer should keep the property insured.

Under such circumstances the contract was made in Wisconsin, the state in which the last act was done

which was necessary to be done to make the agreement a binding contract. (*Michelin Tire Co. v. Coleman, etc.*, 179 Cal. 587; *Fitzhugh v. University Realty Co.*, 46 Cal. App. 198.)

The goods having been delivered by the seller to the carrier, F. O. B. cars, at Cudahy, Wisconsin, the contract was also made in Wisconsin.

These propositions are amply supported by the decision in the case of *City etc. v. Weber Packing Corporation*, 73 Pac. (2d) 1272 (Utah), which was an action for damages for breach of an implied warranty in respect to ketchup sold by the defendant to plaintiff. In that case the court declared:

“It would seem the contract of purchase was made and performed in Utah. The order for the goods was solicited from the grocery company on behalf of the packing corporation by a broker in Kansas City, Mo. The written contract of sale was signed by the grocery company at Kansas City and sent to Ogden, where it became a binding obligation on the part of both parties upon acceptance and execution by the packing corporation.

“A contract between parties in different states is made at the place where the last act necessary to give it validity is performed. *Lawson v. Tripp*, 34 Utah 28, 95 P. 520.

“The written contract provided: ‘Terms: F.O.B. seller’s factory, sight draft with bill of lading.’ The buyer was to carry its own insurance and ‘Notwithstanding shipped to seller’s order, goods are at risk of buyer from and after delivery to carrier.’ * * *

“The catsup was received, paid for, and lodged in plaintiff’s warehouse at Kansas City.

“We have, therefore, a Utah contract, fulfilled by the packing corporation by delivery of the goods to a carrier for transportation to Kansas City in interstate commerce.”

The contract in the present case not being effective until accepted by the seller in Wisconsin, and the goods having been sold f.o.b., Cudahy, Wisconsin, the buyer to keep the goods insured, the contract was not only made but fully performed in Wisconsin when the goods were delivered by the seller to the carrier.

Section 1646 of our Civil Code provides that a contract is to be interpreted according to the law and usage of the place where it is to be performed; or if it does not indicate a place of performance, according to the law and usage of the place where it is made.

It appearing from the above authorities that the contract in question in the instant case was both made and performed in Wisconsin, the contract is to be construed and interpreted according to the law and usage of Wisconsin, and hence the consequential damages in respect to which the defendant was exempted from by the terms of the contract are only those arising from the continuing wrong of defendant, coupled with the concurrent negligence of a third person, or the operation of natural forces.

The California cases are uniform in holding that if the action of either of two or more persons constitute a proximate cause of the injury complained of, both or either are liable for the resulting damages sustained.

In *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, plaintiff brought an action against defendant gas company for damages for personal injuries sustained

by the plaintiff as the result of a gas explosion in a restaurant in which plaintiff was eating. The proprietor of the restaurant had discovered a leak in defendant's gas line, and advised the gas company of such fact, and was told to shut off the gas stove. This the proprietor failed to do and the explosion followed. Defendant contended the explosion was caused by the negligence of the proprietor of the restaurant rather than by that of the gas company. The court, in holding that if an injury is caused by the conjoined or concurrent acts of two or more parties, both are liable, said at page 505:

“And, so, Judge Ray's definition is not to be accepted in its fulness, nor to be accepted at all, without the important further modification that the original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result.”

Again in the case of *Sawdey v. Producers' Milk Co.*, 107 Cal. App. 467, an action was brought for damages for wrongful death of Mildred E. Sawdey. The car in which deceased was riding ran into the rear of the truck which was driven by an employee of the defendant Rasmussen Company, such driver having left the truck unattended in a used portion of the highway. The two cars became locked together, and, while deceased was thus placed in a position of danger, a car driven by an employee of the Standard Creameries Company ran into

the two standing cars. The court, in affirming the judgment for plaintiff against Rasmussen Company, although the injury was immediately precipitated by the operator of the creamery company truck, said at page 480:

“It is well-established law that the original wrongful act may be so continuous that the action of a third person precipitating the disaster will, in law, be regarded as not independent, but as joining with the original act to produce the accident.” (Citing authorities.)

“The mere fact that one of several concurring causes may not have been reasonably anticipated is not enough to shield from liability him who sets in motion the other; for it is well settled that the negligence complained of need not be the sole cause of the injury. It is enough to show that it is a proximate concurring cause; that is, one that was so efficient in causation that, but for it, the injury would not have occurred.” (Citing authorities.)

“It has been held and is the law of this state that where an injury results from two separate and distinct acts of negligence by different persons operating and concurring simultaneously and concurrently, both are proximate causes and recovery may be had against either or both of the responsible persons.”

In *McKay v. Hedger*, 139 Cal. App. 266, an action was brought to recover damages for personal injuries sustained by a child when running from behind an ice truck which had double parked beside a bakery truck, both of which cars were headed west. The plaintiff was struck by an east bound automobile. The vision of the driver of the automobile which struck the children was obstructed by the double parking of the ice truck. The court, in

affirming the judgment against the ice company, even though the injury of the boy was immediately caused by being struck by the east bound automobile, that is, by the independent act of a third person, said at page 275:

“The rule is stated in *Hale v. Pacific Telephone & Telegraph Co.*, 42 Cal. App. 55, 183 Pac. 280, and approved in *Sawyer v. Southern Cal. Gas Co.*, 206 Cal. 366, 274 Pac. 544, that ‘where the original negligence of a defendant is followed by an independent act of a third person which results in a direct injury to a plaintiff, the negligence of such defendant may, nevertheless, constitute the proximate cause thereof if, in the ordinary and natural course of events, a defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury.’ ”

In *Fennessey v. Pacific Gas & Electric Company*, 10 Cal. (2d) 538, plaintiff sought damages for personal injuries resulting from being run into by an automobile operated by one Manecis, while plaintiff was standing in a safety zone and while Manecis was operating his car to the left of such safety zone, by reason of the fact that the defendant’s tower car was parked between the curb and such safety zone, when not in actual use in

repairing the wires of the defendant electric company. Plaintiff had judgment against Manecis only. The defendant gas and electric company appealed from an order granting plaintiff a new trial as against defendant electric company. The court, in holding the original proximate cause is not always arrested by the intervention of an independent, concurrent cause, said at page 544:

“Another instruction was as follows: ‘If you believe from the evidence that both defendants were negligent, and you further believe that the negligence of the defendant Manecis was an *independent intervening act* which was the efficient cause of the injury to plaintiff, then your verdict must be in favor of the Pacific Gas & Electric Company.’ (Italics ours.) Proximate causation, it has been held, is not always arrested by the intervention of an independent concurring cause.”

In *Cummings v. Kendall*, 34 Cal. App. (2d) 379, as in *Sawdey v. Producers Milk Co.*, *supra*, plaintiff sought damages for personal injuries resulting from the car operated by appellant running into the rear of the car in which plaintiff was riding, after the car in which plaintiff was riding had run head on into the car operated by a third person. Appellant contended he could not see the car operated by the third person, but he did hear the impact but failed to immediately apply his brakes. The court, in denying that one can escape liability for his own negligence, even though the injury would not have

been caused but for the negligence of a third person, said at page 382:

“ ‘Under the principle stated in the foregoing section, if the negligence of defendant is *one of the proximate causes of the injury of which the plaintiff complains*, he cannot escape liability by showing that the negligence of a third person also contributed to the injury, and that the accident would not have happened but for such negligence of the third person.’ ”

It is to be seen that in each of these cases the defendant, whose negligence was but one of the proximate causes of the injury, was held responsible for the resulting injuries, although such injuries would not have resulted but for the concurrent negligence of some third person. In other words, the injuries were produced by the concurrence of some act of negligence of defendant with some other event, or act of a third person, attributable to the same origin or cause.

We submit that it was the liability for injuries resulting from such concurrent causes that the parties by the contract in question sought to relieve the defendant from and when so construed all of the provisions of the contract can be given effect without doing violence to any of them. So construed the contract would not exempt defendant from liability for any damages here sought to be recovered, all of which were directly and proximately caused by breach of the implied warranty and express warranty contained in the contract, without the concurrence of any other event.

III.

The Court Erred in Failing to Find That the Parties Had Placed Such a Practical Construction on the Contract by Their Conduct as to Require the Court to Hold that the Waiver Contained in the Contract Would Not Bar Plaintiff's Action for Damages Here Sought to Be Recovered.

We have heretofore pointed out that after plaintiff discovered that the machinery did not meet the terms of the implied warranty, nor the requirements of the plaintiff, as disclosed to the defendant before the making of the contract, the defendant proceeded to devote 313 hours, without charge, to plaintiff, in an attempt to adjust the machinery so that it would comply with plaintiff's requirements. [Tr. p. 30.] Such action clearly demonstrates that the parties by their conduct so construed the contract as to render defendant liable for plaintiff's claims for damages arising from the defects which resulted in the damages which we have hereinbefore enumerated, and so as to preclude defendant from relying upon the alleged waiver contained in the contract.

In *Holbrook v. Petrol*, 111 Fed. (2d) 967, plaintiff, as receiver, brought an action for the alleged balance due for oil delivered to defendant in excess of the money advanced by defendant to the receiver. During the performance of the contract the price of gasoline, to which the crude oil sold under the contract was correlated, fell below the minimum price of gasoline set forth in the schedule contained in the contract. During this period the defendant rendered monthly statements, showing the amount allowed for each delivery of oil. To these statements the receiver made no objection and his account-

ings were settled accordingly by the Federal Court, and in reliance upon such action by the receiver the defendant continued to advance money to the receiver. The court, in holding that this was a case in which the rule as to the practical construction of the contract by the parties applied, and in discussing the operation of such rule, said at page 969:

“It is clear, in view of the ambiguities of the contract, that we have here a case for the application of the rule that the practical construction of the contract by the parties may be considered in determining their intent. The principle was thus stated by Mr. Justice Swayne in delivering the opinion of the court in *Brooklyn Life Insurance Co. v. Dutcher*, 95 U. S. 269, 273, 24 L. Ed. 410: ‘The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case.’ (Citing authorities.)

In *Cowles v. Independent Elevator Co.*, 22 Cal. App. (2d) 109, the guest of a hotel, brought an action for damages for personal injuries alleged to have been caused by the negligent manner in which the defendant inspected

the elevator of the hotel. Under the contract between the hotel and the defendant, it was provided that the defendant's service should consist of a thorough and complete going over of the elevator apparatus, oiling, greasing, cleaning and adjustments. The court, in holding that the testimony of the inspector employed by defendant, to the effect that such service included the correction of defects, was admissible to establish the practical construction which the parties had placed on the contract in respect to the duties of the defendant thereunder, said at page 113:

“The testimony of which the defendant complains was by its inspector, who described the service defendant had rendered, which included not only an examination of the manner in which the elevator was working, but also the correction of defects, particularly those appearing in the electrical apparatus and connections used in its operation. This testimony was competent for the purpose of showing the construction placed on the contract by the parties (6 Cal. Jur., Contracts, sec. 184, p. 304), and although not expressly pleaded, the defendant was not prejudiced by its admission.”

See also:

Duff v. Anderson, 50 Cal. App. 397;

Bayles v. Browning, 133 Cal. App. 618;

Burgess v. California Mutual B. & L. Assn., 210 Cal. 180;

Hunt v. United Bank & Trust Co., 210 Cal. 108.

IV.

The Plaintiff's Action Is Not Barred by the Statute of Limitations or Laches, It Having Retained the Machinery at Defendant's Request, in Order to Afford the Defendant an Opportunity to Place the Machinery in Such Working Order as to Comply With Defendant's Representations and Plaintiff's Requirements, and Plaintiff Having Deferred the Commencement of Its Action in Reliance Upon Defendant's Representations That It Would Place the Machinery in Such Working Order as to Comply With Defendant's Representations and Plaintiff's Requirements.

It appears from paragraph VI of the amended complaint that after plaintiff discovered that the machinery in question was incapable of fulfilling the purpose for which the plaintiff represented to defendant that plaintiff required the machinery, the defendant represented to plaintiff that defendant would be able to make the machinery operate in accordance with the implied warranty and pursuant to such representation the defendant devoted 313 hours between May and July, 1938, in attempting to so adjust said machinery that it would comply with the implied warranty and meet plaintiff's requirements, and that plaintiff relied upon such representations in deferring the commencement of its action for damages for breach of implied warranty, the defendant having continued to make such representations up to shortly prior to the commencement of this action. [Tr. pp. 30-31.]

In *American Rumely Thrasher Co. v. McCoy*, 213 Cal. 226, the court at page 232 said:

“The record establishes that each time the defendant gave notice to the plaintiff that he refused to accept the harvesters because of breakdowns and defects, the agents of the seller attempted to reconstruct and repair the machines in an endeavor to put them in a satisfactory condition so as to obtain an acceptance by the defendant. We cannot say on the record that the trial court was not justified under the authorities cited and under the terms of the contract in concluding that the evidence did not disclose such operation of the harvesters by the defendant as would constitute an acceptance.”

In *Ray v. American Photo Player Co.*, 46 Cal. App. 311, the same rule was announced by the court in the following language at page 316:

“A principal may not take the benefit of a transaction of his agent on behalf of the principal, and deny the authority of the agent. The retention of the benefit constitutes a ratification of the act of the agent. The appellant contends that the plaintiff waived his right to rescind by making the payment he was induced to make by the new promise, and by failing to rescind more promptly. The defendant cannot rely upon delays which have been the result of indulgence it induced the plaintiff to extend to it.”

We submit upon these authorities that the plaintiff cannot be held to have accepted the machinery and that the plaintiff's action upon the implied warranty is not barred by reason of any delay in commencing the action, inasmuch as the delay was induced by defendant's representations that the machines would be placed in good working condition.

V.

Surrounding Circumstances Upon Which an Implied Warranty Is Predicated May Be Shown by Parol Testimony Notwithstanding the Contract Was Reduced to Writing and Contained a Statement That the Parties Were Not Bound by Any Verbal Understanding, the Contract Not Having Contained a Detailed Statement of the Warranty, or a Detailed Description of the Goods.

In *Fox v. Harvester etc. Works*, 83 Cal. 333, it was held that parol evidence was admissible to show that the agent of the seller represented to the buyer that a certain harvester would cut, thrash and clean from 20 to 25 acres of grain per day, the only warranty contained in the written contract being that the harvester was "warranted to do good work". In this connection the court instructed the jury as follows:

"'3. If you find, from the evidence, that L. U. Shippee was the general agent of defendant to sell machines, and that said Shippee, in order to induce plaintiffs to purchase said two machines in the complaint mentioned, represented to plaintiff and warranted that said machines would cut, thrash, and clean from twenty to twenty-five acres of grain per day; and if you further find, from the evidence, that said machines, when properly handled and run, would not cut, thrash, and clean from twenty to twenty-five acres of grain per day,—then you will find a verdict for the plaintiffs.' " (Pages 337-338.)

The court, in holding it proper to so instruct the jury, said at page 343:

“We think the instructions 1, 3 and 5 were properly given. They were applicable to the evidence. Instruction 5 was in accordance with the testimony as to representations referred to in it, which were properly submitted to the jury, to determine whether or not they were intended by defendants as warranties.”

In *Inner Shoe Tire Co. v. Tondro*, 83 Cal. App. 689, the court stated the rule as follows:

“Where the written order does not contain a detailed description of the goods bargained for in the first instance, it is proper to show that the defendant was induced to enter into the agreement by the representations contained in placards and literature shown by plaintiff through its agent.”

In *Williams v. Lowenthal*, 124 Cal. App. 179, plaintiff brought an action to recover the balance of the purchase price of a musical instrument known as an orchestrope. The conditional sales contract simply contained a statement of the time and amount of installment payments to be made, and contained a statement that no warranty or guarantee was given, unless specified in the written agreement, which was declared to contain the entire contract between the parties. At the time of the execution of the contract the seller represented that it was a good machine. While the court held defendant failed to show a breach of any express warranty, nevertheless, the court,

in pointing out that under the circumstances an implied warranty arose by operation of law, said at page 185:

“It is, however, generally recognized that although there is no express warranty of fitness, nevertheless the law will imply a warranty that the article sold is reasonably adapted to the purpose for which it is purchased. (35 Cyc. 408; *Lamb v. Otto*, 51 Cal. App. 433, 197 Pac. 147.) Section 1735 of the Civil Code, added by the legislature of 1931, declares that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale except under certain conditions therein specified. Subdivision 1 of the section sets out the only conditions which are here applicable. This subdivision is in the following language:

‘(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller’s skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.’

It may be conceded that, notwithstanding the absence of an express warranty of fitness, nevertheless the circumstances presented by the evidence were such that a warranty that the instrument was fit for the purpose for which it was sold was raised by implication of law.”

In *Luitweiler etc. Co. v. Ukiah etc. Co.*, 16 Cal. App. 196, the court quoted from *Hault v. Baldwin*, 67 Cal. 610, as follows:

“The supreme court declared that ‘Having taken the machine under a warranty, whether it be that expressed in the writing or provided by the code, or both, the defendant had the right, if there was a breach of the warranty, that is, if in any respect the machine was not what it was warranted to be, to rescind the sale by returning or offering to return it to the plaintiff.’ ”

In *Tracy Brick etc. Co. v. Wurster*, 44 Cal. App. 652, the court said:

“Furthermore, it appears that the writing itself is silent as to any warranty of the materials which would be furnished in accordance with its terms; and this being so, the admission of parol evidence as to the existence, either of oral warranties made during the inception of the transaction between the parties, or of such implied warranties, as arose by operation of law from the making of either oral or written agreements between the manufacturer and the purchaser of such materials as furnished the subject matter of the transaction between the parties, could not be held to vary the terms of the written agreement in question. It was not error, therefore, for the court to admit such evidence.”

In *American S. R. Co. v. Joshua Hendy Iron Works*, 94 Cal. App. 289, the court in pointing out that the implied warranties mentioned in Section 1735 of the Civil Code are deemed to be incorporated in every contract, said at page 291:

“And, as above shown, it is the established rule in this state that these warranties implied by law may be deemed incorporated in the contract.” (Citing numerous authorities.)

It thus becomes apparent that upon the trial of the action plaintiff will be entitled to prove the implied warranty pleaded in the first cause of action, predicated upon the fact that plaintiff made known to defendant the particular purpose for which the machinery was required and relied upon defendant's judgment and representation that it would meet plaintiff's requirements, notwithstanding the provision in the contract to the effect that “verbal understandings are not binding unless specified in this contract”, for such implied warranty is deemed to be incorporated into the written terms of the contract.

Moreover, as pointed out under the next subdivision of this brief, the contract contains an express warranty that, “Seller guarantees the proper working of the goods sold under reasonable operation thereof, according to seller's instructions”, upon which express warranty plaintiff will likewise be entitled to recover upon proof of its breach, as it is inconsistent with, and repugnant to, the subsequent alleged waiver of damages.

VI.

The Waiver Contained in the Contract and Relied Upon by the Defendant Is Repugnant to the Preceding Clause Expressly Guaranteeing the Working of the Machinery, and Hence the Former Clause Containing the Guaranty Must Be Deemed to Be Controlling and the Subsequent Inconsistent Waiver Rejected.

The language of the clause contained in the guarantee is as follows:

“Seller guarantees the proper working of goods sold under reasonable operation thereof, according to Seller’s instructions.”

Such guarantee is followed by the alleged waiver relied upon by the defendant, which is in the following language:

“Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods.”

It is apparent that if the latter of these two clauses be construed to constitute a waiver of damages of every nature, such clause is inconsistent with the preceding clause containing the guarantee. Such being the case the preceding clause must be given effect and the subsequent clause rejected.

In *Burns v. Peters*, 5 Cal. (2d) 619, the beneficiary and purchaser under a trust deed recorded December 13, 1930, sought to quiet title against a judgment creditor

who purchased the property on execution sale had in connection with an action in which an attachment was issued and levied on the property, May 4, 1931. Defendant contended that the trust deed created no lien and passed no title to the trustee because the trustee had not accepted the trust before the recordation of the trust deed, as required by one of the clauses of the trust deed, such provision having been preceded by other clauses declaring the trust deed to have been executed to secure payment of the indebtedness therein described. The court, in holding that if the two clauses were held to be repugnant the former should be accepted and the latter rejected, said at page 623:

“The general rule is that where two clauses of a contract cannot be reconciled the first shall be received and the latter rejected. (6 R. C. L. 847.)”

It necessarily follows that if the guarantee of the proper working of the machine be held to be repugnant to the subsequent provision in respect to the alleged waiver for claim of damages herein sought to be recovered, the clause containing the guarantee must be accepted as binding on the parties and the subsequent clause in respect to the alleged waiver of the claim for damages must be rejected.

Conclusion.

Consequential damages are those caused by the concurrence of some other event with some act of negligence on the part of the defendant, and which other event is attributable to the same origin or cause. It not being contended that the damages here sought to be recovered resulted from the concurrence of any other event with the negligence of defendant, the waiver relied upon by defendant, which by virtue of the rule of *ejusdem generis* is limited in its operation to consequential damages, does not operate to bar plaintiff's action for the direct damages proximately caused by the breach of defendant's implied warranty, without the interposition of any other independent cause. Neither is plaintiff's action barred by the provision in the contract that no verbal understandings are binding on the parties, because the implied warranty shown to exist became by operation of law a part of the written contract.

Moreover the practical construction of the contract, evidenced by the conduct of the parties, shows that the parties did not intend that the plaintiff should have been deemed to have waived their claim for damages here sought to be recovered.

Respectfully submitted,

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No. 10056

IN THE

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United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,

Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

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No. 10056

IN THE

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FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,

Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement as to Jurisdiction.

The Court below, the District Court of the United States for the Southern District of California, Central Division (hereinafter called the "District Court") acquired jurisdiction pursuant to the provisions of Sections 24 and 28 of the Judicial Code (28 U. S. C. A. §§41 and 71] by virtue of the removal of the cause to it from the Superior Court of the State of California in and for the County of Los Angeles (hereinafter called the "Superior Court") on the ground of diversity of citizenship. Appellant is a corporation incorporated under the laws of the State of California and a citizen and resident of that State. [Original Complaint—Tr. p. 2; Petition for Removal—Tr. pp. 10-11; Amended Complaint—Tr. p. 24.]

Appellee is a corporation incorporated under the laws of the State of Wisconsin and a resident and citizen of that State. [Original Complaint—Tr. pp. 2-3; Petition for Removal—Tr. p. 11; Amended Complaint—Tr. pp. 24-25.] The action is one of a civil nature at law for damages for alleged breach of warranty and the amount in controversy, exclusive of interest and costs, exceeds \$3,000.00. [Original Complaint—Tr. p. 7; Petition for Removal—Tr. pp. 11-12; Amended Complaint—Tr. pp. 25, 42.]

This Court has appellate jurisdiction under Section 128 of the Judicial Code (28 U. S. C. A. §225) if the appeal was taken in time. As will hereafter appear, however, it is appellee's contention that the appeal was not taken within the time prescribed by law and hence that this Court does not have jurisdiction.

Statement of the Case.

Appellant instituted this action against appellee by filing in the Superior Court, on May 16, 1940, its verified "Complaint—Damages for Breach of Warranty". [Tr. pp. 2-9.] In such complaint appellant alleged in substance that on February 14, 1938, appellant as buyer and appellee as seller entered into a written contract for the purchase by appellant from appellee of certain beer bottling machinery for use in appellant's business of brewing and bottling beer [Tr. p. 3]; that in the contract appellee warranted and guaranteed the proper working of the machinery when operated reasonably and in accordance with appellee's instructions [Tr. pp. 4-6]; that following the installation of the machinery various parts thereof broke and became out of adjustment thereby causing

shutdowns in the operation of the machinery, all to appellant's damage in the sum of \$50,000.00. [Tr. p. 7.] A copy of the contract between appellant and appellee was annexed to the complaint, marked Exhibit "A" and by reference incorporated therein. [Tr. pp. 3, 8.]

Within the time that appellee was required by the California laws and the rules of the Superior Court to plead to appellant's complaint, and on May 27, 1940, appellee filed in the Superior Court a petition for the removal of the cause to the District Court, together with the necessary bond for removal. [Tr. pp. 10-18.] On the same day the Superior Court made an order for such removal of the cause. [Tr. pp. 18-19.] In due course, and on June 21, 1940, a copy of the record in the Superior Court was filed with the Clerk of the District Court. [Tr. pp. 19-20.]

After the filing of the copy of the record in the District Court, appellee moved that Court to dismiss the action, on the ground that the complaint failed to state a claim against appellee upon which relief could be granted. [Tr. pp. 20-21.] Such motion was granted by the District Court by its order dated July 15, 1940, with leave, however, to appellant to file an amended complaint within twenty days. [Tr. pp. 22-23.]

On November 5, 1940, appellant filed in the District Court an amended complaint [Tr. pp. 24-43] which was also verified. [Tr. p. 43.]

The amended complaint, like the original complaint, was designated one to recover "Damages for Breach of Warranty". [Tr. p. 24.] The amended complaint, however, differed from the original in two important respects. *First*: No copy of the contract of sale between appellant

and appellee was annexed to the amended complaint, nor was it therein fully and fairly pleaded according to its legal effect in that it did not disclose, *inter alia*, that the contract contained any limitation upon appellee's liability for damages for breach of warranty. *Second*: The damages claimed by appellant were increased from \$50,000.00 to \$214,155.78, and the so augmented damages were alleged to consist of the following items:

(1) \$37,978.14 for wages paid and to be paid by appellant to "extra" labor required to operate the machinery. [Tr. pp. 31-33.]

(2) \$13,363.62 for beer spoiled because the machinery did not properly pasteurize it. [Tr. pp. 33-35.]

(3) \$50,192.00 for profits and good will lost because beer, improperly pasteurized by the machinery, reached the hands of appellant's customers. [Tr. pp. 35-36.]

(4) \$19,380.00 as the cost of "extra" caustic soda required and to be required by appellant in the operation of the machinery. [Tr. pp. 36-37.]

(5) \$1,262.63 for beer lost because the filling apparatus of the machinery filled beer bottles too full. [Tr. pp. 37-38.]

(6) \$27,920.00 for "excessive depreciation" in the machinery [Tr. p. 38]; \$2,729.98 for expense of replacing broken parts [Tr. pp. 38-39]; and \$2,531.25 for cost of labor engaged to repair the machinery. [Tr. p. 39.]

(7) \$26,458.16 for wages which appellant paid to its employees who were idle during breakdowns

of the machinery occurring prior to the filing of the amended complaint, and \$32,340.00 for wages which appellant will be required to pay to its employees who will be idle during breakdowns anticipated by appellant to occur subsequent to the filing of the amended complaint. [Tr. pp. 39-40.]

While the amended complaint is in two counts, both charge the machinery did not work as warranted, and by each count appellant seeks recovery of the identical items of damage. As we read the first count, it proceeds on the theory of breach of the several oral warranties (termed "representations") alleged in paragraph III thereof [Tr. pp. 25-28]; appellant insists that the theory of the first count is breach of an implied warranty. [Br. pp. 5, 33.] The second count, as appellant states [Br. p. 7], proceeds on the theory of breach of the express warranty or guaranty contained in the written contract.

Responsive to the amended complaint, appellee filed an answer which is set out at length in the record. [Tr. pp. 44-81.] By its answer appellee, *inter alia*:

(a) Denied the existence of any contract with appellant, other than the written contract for sale of machinery, copy of which is annexed to the original complaint as Exhibit "A" [Tr. p. 8] (and further copy of which is annexed to the answer as Exhibit "A"—Tr. p. 66), as such contract was supplemented by the agreement between the parties dated December 6, 1938, which enlarged the time for payment of the purchase price (copy of the supplemental agreement is annexed to the answer marked Exhibit "B"—Tr. p. 67). [Tr. pp. 46-47, 62-63.]

(b) Denied that appellee made any of the representations detailed in the amended complaint [Tr. p. 46], or made any warranty respecting the machinery sold to appellant except that expressed in the guarantee set forth in the written contract. [Tr. pp. 47-48, 64.]

(c) Denied any breach of warranty [Tr. pp. 48, 64] and alleged that any failure of the machinery to work properly was due exclusively to appellant's failure to operate the same reasonably in accordance with appellee's directions. [Tr. pp. 59-61, 64-65.]

(d) Alleged that the written contract expressly provided that appellee should not be liable for any of the damages claimed by appellant. [Tr. pp. 61-62, 65.]

(e) Set up a counterclaim, based upon an account between appellee and appellant. [Tr. p. 66.]

For the purposes of this appeal it is unnecessary to give detailed consideration to the contents of the answer.

Following the interposition of its answer, appellee filed in the District Court a motion for summary judgment in its favor as to each and every claim asserted against it in and by appellant's amended complaint, on the following grounds:

1. That the pleadings on file, including appellant's original complaint, showed that there was no genuine issue as to the following material facts:

- (a) The agreement between appellant and appellee was reduced to writing and completely expressed in the written contract dated February 14, 1938, as such contract was supplemented by the agreement dated December 6, 1938.

(b) In both the original and supplemental contracts it is expressly provided that no verbal understanding is binding unless specified therein.

(c) It is further expressly provided in both the original and supplemental contracts that appellee shall not be liable for any damages or consequential damages incident to the operation of the machinery.

(d) The damages claimed to have been sustained by appellant, and itemized in appellant's amended complaint, are damages or consequential damages incident to the operation of the machinery.

2. That by virtue of the facts aforesaid, appellee is entitled as a matter of law to a judgment in its favor as to each and every claim asserted by appellant in its amended complaint.

[Tr. pp. 81-83.]

The motion for summary judgment came on regularly for hearing before the District Court on September 29, 1941, and was thereupon argued by counsel for the respective parties. [Tr. p. 88.] At the hearing and pursuant to stipulation of counsel, photographic copies of the contract between the parties dated February 14, 1938, and the contract supplemental thereto dated December 6, 1938, were received in evidence. [Tr. pp. ii, 88.] Following the hearing and argument on September 29, 1941, the District Court took the matter under submission and thereafter, and on October 8, 1941, made its order granting the motion. [Tr. p. 84.]

The Clerk of the District Court entered the order granting the appellee's motion for summary judgment and notified counsel on October 8, 1941. [Tr. p. 87.] On the same day the District Court filed a memorandum decision. [Tr. pp. 85-86.]

A formal judgment on appellant's claims was signed by the District Judge on October 11, 1941, and entered in the Civil Docket on October 13, 1941. [Tr. pp. 87-89.]

Appellant filed notice of appeal on January 13, 1942. [Tr. pp. 89-90.] In support of its appeal appellant urges that the District Court erroneously granted appellee's motion for summary judgment, and there is thus presented to this Court the same question which was presented to the District Court, viz.: Do the provisions of the written contract between the appellant and appellee preclude recovery from appellee of the damages claimed by appellant in its amended complaint?

SUMMARY OF ARGUMENT.

I.

This Court has no jurisdiction, because notice of appeal was not filed until more than three months had elapsed after the entry of the order granting appellee's motion for summary judgment.

II.

The agreement between the parties was reduced to writing and the express terms of the written contract preclude recovery from appellee of the damages claimed by appellant in its amended complaint.

- A. The contract between the parties is in writing, and there is not, and cannot be, any genuine issue as to its provisions.
- B. Parties to a contract may specify the remedy or remedies which will be available to each on the default of the other and, likewise, by agreement, may limit the liability of the defaulting party.
- C. Appellant's exclusive remedy for the alleged breach of warranty was that specified in the contract, namely, the right to return and receive credit for defective parts.
- D. The damages claimed by appellant are *consequential damages* incident to the operation of the machinery, and the written contract between the parties provides that appellee shall not be liable for such damages.

III.

Reply to appellant's points.

- A. The rule of *ejusdem generis* is not applicable to the clause of the contract in question.
- B. The term "consequential damages," as used generally in sales agreements and in the instant contract, means exactly the type of damages appellant seeks to recover.
- C. The allegations of the amended complaint do not show any practical construction of the contract by the parties, and the clause of the contract in question, in any event, is free from ambiguity.
- D. No question as to the statute of limitations or laches was presented by the motion for summary judgment, nor decided by the District Court, nor is any such question presented by this appeal.
- E. It is immaterial whether any warranty, in addition to that expressed in the written contract, could be implied; the sole question is as to appellee's liability for the damages claimed by appellant in its amended complaint.
- F. There is no inconsistency between the guarantee, as expressed in the contract, and the clause therein contained exonerating appellee from liability for damages incident to the operation of the machinery.

ARGUMENT.

I.

This Court Has No Jurisdiction Because Notice of Appeal Was Not Filed Until More Than Three Months Had Elapsed After the Entry of the Order Granting Appellee's Motion for Summary Judgment.

A period of three months and five days elapsed between the entry on October 8, 1941 [Tr. p. 87] of the order of the District Court granting appellee's motion for summary judgment and the filing by appellant on January 13, 1942, of its notice of appeal. [Tr. pp. 89-90.]

This Court has jurisdiction to review a *final decision* of the District Court, provided that the appeal be taken within three months after the entry of such final decision.

Judicial Code, Sec. 128 (28 U. S. C. A. §§225, 230).

We think it clear that the order of the District Court granting appellee's motion for summary judgment was a final decision within the meaning of Section 128 of the Judicial Code. The familiar test to be applied to determine whether or not an order is a final decision is this: Does the order terminate the litigation, so that, if affirmed, the Court below will have nothing to do except to execute the order if it grants affirmative relief?

State of Washington v. United States (C. C. A. 9), 87 Fed. (2d) 421, 433.

Thus it has been uniformly held that an order of dismissal or an order granting a motion to dismiss is a final

decision, from which an appeal will lie because it terminates the litigation.

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 96, 42 Sup. Ct. 35, 66 L. Ed. 144;

Hicks v. Bekins Moving & Storage Co. (C. C. A. 9), 115 Fed. (2d) 406, 409;

Johnson v. Horton (C. C. A. 9), 63 Fed. (2d) 950, 952;

Colorado Eastern Ry. Co. v. Union Pacific Ry. Co. (C. C. A. 8), 94 Fed. 312, 313;

Collins v. Metro-Goldwyn Pictures Corporation (C. C. A. 2), 106 Fed. (2d) 83, 84-86.

The order made by the District Court granting appellee's motion for summary judgment, following the recital therein of the nature of the motion and the submission of the matter for decision, declared:

"The said motion *is hereby granted* upon the ground that by the terms of the contract of sale of the machinery, dated February 14, 1938, the plaintiff waived the damages it now seeks to recover." [Tr. p. 84.]

(Emphasis here and elsewhere is ours, unless otherwise indicated.)

The phraseology of such order is strikingly similar to that of the order considered in *Johnson v. Wilson* (C. C. A. 9), 118 Fed. (2d) 557. This Court held that the order made in that case was a final decision from which an appeal would lie; the material portion of that order read:

"It is ordered that judgment be, and the same hereby is, granted in favor of defendant upon the

ground that the evidence is insufficient to establish that defendant had reasonable cause to believe that a preference would thereby be effected by the payments in question to him made and by the action sought to be recovered.”

118 Fed. (2d) 558.

The order in the instant case provided that the motion for summary judgment “*is hereby granted,*” which is equivalent to “judgment in appellee’s favor is hereby granted.” To paraphrase the language of the United States Supreme Court in *Wilson v. Republic Iron & Steel Co., supra*, the order granting appellee’s motion for summary judgment “effectively terminates plaintiff’s (appellant’s) case, prevents the plaintiff from further prosecuting the same and relieves the defendant from putting in a defense.” (257 U. S. 96.) It is therefore submitted that appellant’s notice of appeal not having been filed until more than three months after the entry of the order, the appeal was not timely taken and, hence, that this Court is without jurisdiction.

Walters v. Baltimore & O. R. Co. (C. C. A. 3), 76 Fed. (2d) 599, 600.

II.

The Agreement Between the Parties Was Reduced to Writing and the Express Terms of the Written Contract Preclude Recovery From Appellee of the Damages Claimed by Appellant in Its Amended Complaint.

A. The Contract Between the Parties Is in Writing, and There Is Not, and Cannot Be, Any Genuine Issue as to Its Provisions.

In its amended complaint appellant did not plead the contract between the parties *in haec verba*, nor did appellant in its amended complaint indicate or suggest that such contract contained any limitation upon the liability of appellee for damages for breach of warranty. A copy of the written contract between the parties, however, was annexed to appellant's original complaint as Exhibit "A" thereof, and in that complaint, which was verified [Tr. p. 9], appellant alleged that the contract between it and appellee was in writing and

"that a full, true and correct copy of said contract is attached hereto, marked Exhibit 'A,' incorporated herein and made a part hereof, the same as though said contract was set forth fully and at length in this paragraph." [Tr. p. 3.]

Appellant further averred in its original complaint that on or about December 6, 1938, the contract between it and appellee was changed and modified "in reference only to the time and manner of payments agreed to be made by" appellant to appellee "on account of the purchase price of said machinery" and that at that time, except as to the method of payment, the original contract was "reaffirmed and all of the terms and conditions thereof again agreed upon by said parties." [Tr. p. 5.] In view of such alle-

gations under oath, there is not, and cannot be, any dispute as to what were the provisions of the agreement between the parties and, pursuant to stipulation between counsel for appellant and appellee, copies of both the original contract and the supplement thereto were received in evidence at the time of the hearing of the motion for summary judgment in the District Court. [Tr. p. 88.]

The original contract, as well as the supplement thereto, expressly repudiates all verbal understandings not incorporated therein. [Tr. p. 8.] There is, hence, no occasion to do more than examine the written contract in order to determine the agreement of the parties, and parol evidence would not be admissible to vary its terms.

Estate of Gaines, 15 Cal. (2d) 255, 264-265, 100 Pac. (2d) 1055;

Merchants Finance Co. v. Acosta Bros., 82 Cal. App. 431, 433, 255 Pac. 772;

Jones v. Keefe, 159 Wis. 584, 150 N. W. 954, 955;

Ohio Electric Co. v. Wisconsin-Minnesota Light & Power Co., 161 Wis. 632, 155 N. W. 112, 113;

Knight & Bostwick v. Moore, 203 Wis. 540, 234 N. W. 902, 904.

Since appellant insists that the contract must be interpreted in accordance with the laws of Wisconsin (Br. pp. 16-18), the decision in *Jones v. Keefe*, *supra*, is peculiarly significant. That case was an action to recover the purchase price of an automobile sold by the plaintiffs to the defendant; the agreement of sale was reduced to writing. In such written contract the sellers guaranteed the car for one year and stipulated that there were no verbal understandings unless specified in the agreement. The buyer defended on the ground of breach of warranty, contending that the car did not fulfill the representations

made by plaintiffs respecting its age, condition and fitness for use as an automobile. The trial court refused to receive evidence of such oral representations and entered judgment in favor of the sellers. The Supreme Court of Wisconsin affirmed the judgment and, in the course of its opinion, said:

“The terms of sale were finally reduced to writing, and this excludes evidence of oral negotiations preceding it, if the terms are free from ambiguity. The contract terms are plain and definite in meaning when applied to the subject of the transaction and cannot be varied or modified by oral testimony. *Johnson v. Pugh*, 110 Wis. 167, 85 N. W. 641; *Newell v. New Holstein Canning Co.*, 119 Wis. 635, 97 N. W. 487. *The clause of the contract that no verbal agreements were entered into not expressed in writing is expressive of the intent and purpose of the parties that all the terms and conditions of the sale are embraced in it.* This stipulation supports the position that the negotiations were finally embodied in the written agreement.”

150 N. W. 955.

The following quotation from *Merchants Finance Co. v. Acosta Bros.*, *supra*, is also in point and shows that the California law is to the same effect:

“And, of course, in so far as an express oral warranty that the tractor was fit for the purpose of pulling a six-foot double disc is concerned, such testimony would be inadmissible on the ground that the contract was thereafter reduced to writing, and all oral negotiations were merged in the written contract.”

82 Cal. App. 433.

Accordingly, there was not below, and there cannot be here, any genuine issue as to the terms of the agreement between the parties.

B. Parties to a Contract May Specify the Remedy or Remedies Which Will Be Available to Each on the Default of the Other and, Likewise, by Agreement, May Limit the Liability of the Defaulting Party.

The law does not compel parties to enter into a contract, and therefore permits them to make such bargain as they see fit respecting the remedy available to, or the damages recoverable by, either party upon the default of the other.

“When a man commits a tort, he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of law a liability to damages, unless a certain promised event comes to pass. But, unlike the case of torts, as the contract is by mutual consent, *the parties themselves*, expressly or by implication, *fix the rule by which the damages* are to be measured.”

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543, 47 L. Ed. 1171, 23 Sup. Ct. 754.

The Circuit Court of Appeals for the Third Circuit had occasion to apply this principle in *Sharples Separator Co. v. Domestic Electric Refrigerator Corp.*, 61 Fed. (2d) 499. In that case a buyer sued to rescind a contract for the sale of refrigerators on the ground that the refrigerators were not as warranted. The contract provided that the seller would replace parts which did not meet the express warranty contained in the contract, namely, that the refrigerators and parts would be of first-class workmanship and material. The Court held that the exclusive remedy for the breach of such warranty was to return the defective parts and, accordingly, denied the buyer the right to rescind, saying:

“As a general principle, the parties to a contract to sell personal property may provide whatever terms

they choose. They may *exclude all ordinary rights* or provide that the rights of the buyer for a breach of warranty *shall be limited to a certain remedy*, and, when they provide for an exclusive remedy, the buyer must avail himself of it or go without redress."

61 Fed. (2d) 501.

In *Barnard & Leas Manufacturing Co. v. Smith*, 77 Ark. 590, 92 S. W. 858, a buyer of mill machinery, when sued for the purchase price, counterclaimed for damages to its business alleged to have resulted from failure of the machinery to operate as warranted. The Court held that the buyer was not entitled to recover such damages, because of the following provision contained in the contract of sale:

"First party shall not be liable for any pecuniary damages either for delays in shipment or in starting said mill, demonstrating results, or for defective material, other than to make good within a reasonable time said defects."

92 S. W. 861.

Lee v. Pauly Motor Truck Co., 179 Wis. 139, 190 N. W. 819, was an action by the buyer of a truck to recover damages alleged to have been sustained as a result of breach of warranty to the effect that the truck was free from defects. The contract provided that the seller would make good at its factory any part or parts found to be defective and returned to the seller within ninety days and that this was the limit of seller's liability. The trial court permitted the buyer to recover damages. The Wisconsin Supreme Court reversed, holding the sole remedy under the contract was to return defective parts to the seller and demand replacement.

In *Washington & O. D. Ry. v. Westinghouse Electric & Manufacturing Co.*, 120 Va. 620, 89 S. E. 131, 91 S. E. 646, the seller of equipment for the electrification of a railroad sued for the purchase price. The defendant railroad company counterclaimed for damages because of the seller's failure to make timely delivery, claiming that such failure subjected the railroad company to substantial liability under its lease of the railroad line. The Court held that the damages claimed by the railroad company ~~be caused by~~ the delay in delivery subjected it to liability under its lease were *consequential* and that the seller was not liable therefor under the clause of the written contract reading:

“Seller shall not be held responsible or liable for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any other cause which is unavoidable or beyond its reasonable control, or, in any event, for *consequential damages*.”

89 S. E. 133.

In *Morris & Co. v. Power Manufacturing Co.* (C. C. A. 6), 17 Fed. (2d) 689, the buyer of an engine sued the seller for *consequential damages* sustained in its business as a result of the failure of the engine to properly function. The contract of sale provided the engine was guaranteed to have a certain capacity, and if after its installation there should be any question as to the engine's capacity, the seller would either repair or replace the engine, or if unable to make the engine meet the condition, would take it back and refund such part of the purchase price as might have been paid. Such contract superseded a prior agreement which expressly provided the seller should not be liable for “consequential damages.”

The Court denied recovery of the alleged damages, holding the sole remedy of the buyer was that stipulated in the contract, viz.: to demand that seller furnish a satisfactory engine or refund the purchase price.

In a number of other cases the Courts have had occasion to consider written contracts of sale containing provisions which specify the remedy of the buyer for breach of warranty or limit the damages he may recover; without exception such contractual provisions have been given effect.

Crandall Engineering Co. v. Winslow Marine Railway Co., 188 Wash. 1, 61 Pac. (2d) 136, 106 A. L. R. 1457;

Graves Ice Cream Co. v. Rudolph W. Wurlitzer Co., 267 Ky. 1, 100 S. W. (2d) 819;

Hill & MacMillan Inc. v. Taylor, 304 Penn. 18, 155 Atl. 103;

Massey-Harris Harvester Co. Inc. v. Hammer, 120 Kan. 700, 244 Pac. 1043;

Martin v. Southern Engine & Pump Co. (Tex. Civ. App.), 130 S. W. (2d) 1065;

Moline Plow Co. v. Hooven, 76 Okla. 250, 185 Pac. 102;

Permutit Co. v. Massasoit Manufacturing Co. (C. C. A. 3), 61 Fed. (2d) 529;

Rose-Derry Corporation v. Proctor & Schwartz, 288 Mass. 332, 193 N. E. 50;

Union Investment Co. v. F. M. Landon Co., 32 Cal. App. 305, 162 Pac. 903;

Wallich Ice Machine Co. v. Hanewald, 275 Mich. 607, 267 N. W. 748.

The written contract between appellant and appellee contains provisions similar to those contained in the sales agreements considered in the cases above cited. Thus, in the instant contract we find:

1. An express guaranty or warranty, viz.: that the machinery would work properly if operated reasonably and in accordance with appellee's instructions;

2. A specification of the remedy available to appellant in the event of the breach of the warranty, namely, the right to return to appellee any defective part or parts of the machinery within two years and to receive credit therefor;

3. An express stipulation that appellee "shall not be liable for delays, damages or consequential damages in shipment, erection, or in operation" of the machinery. [Tr. p. 8.]

C. Appellant's Exclusive Remedy for the Alleged Breach of Warranty Was That Specified in the Contract, Namely, the Right to Return and Receive Credit for Defective Parts.

We think the sole remedy available to appellant for the alleged breach of warranty is that specified in the contract, *i. e.*, the right to return to appellee within two years any defective parts of the machinery and to receive credit therefor. This conclusion is abundantly supported, we submit, by *Sharples Separator Co. v. Domestic Electric Refrigerator Corp.*, *supra*; *Lee v. Pauly Motor Truck Co.*, *supra*, and *Morris & Co. v. Power Manufacturing Co.*, *supra*, brief digests of which cases appear in the preceding subdivision of this brief.

A decision to the same effect is *Union Investment Co. v. F. M. Landon Co., supra*. In that case the purchaser of a stallion was sued for the balance of the purchase price. The contract of sale was in writing and therein the seller warranted the productivity of the stallion; it was further provided that if the stallion was not as warranted, the seller would replace it with another stallion. The buyer defended on the ground that the stallion was not as warranted. The Court held that under the contract the sole remedy of the buyer was to return the stallion and demand a different horse in its place, saying:

“By the contract the parties fixed their own remedy in case of a breach, and *it is the exclusive remedy*. They had the right to do this, and having bound themselves to the remedy so fixed, their rights must be measured thereby.”

32 Cal. App. 309.

Another case which is precisely in point is *Permutit Co. v. Massasoit Manufacturing Co., supra*. That was an action for damages for breach of warranty of fitness of a water filtration system. The contract contained guarantees as to the capacity of the equipment and the clearness of the water processed thereby and provided that the seller should make good any defects due to faulty design, workmanship or material. The principal damages claimed by the buyer were alleged to have been sustained by use of the water processed by the machine in the course of manufacturing cotton goods.

The Court held that the provision of the contract whereby the seller agreed to make good any defects in machinery limited seller's liability and that it was not

liable for damages to goods, in the manufacture of which water processed by the machinery was used. In its opinion the Court said:

“It follows from what has already been said that the trial court erred in admitting evidence of special damages, consisting of *damages to the manufactured cotton and of increase in production, manufacturing, and overhead costs and expenses*. The authorities overwhelmingly establish the doctrine that, where the parties have set out in the written contract the warranties agreed upon and have provided for a remedy in case of a breach of warranty, *the remedy thus provided is exclusive*. *Sloan v. Wolf Co.*, 124 F. 196 (C. C. A. 8); *Hickman v. Sawyer*, 216 F. 281 (C. C. A. 4), and *Morris & Co. v. Power Mfg. Co.*, 17 F. (2d) 689 (C. C. A. 6), are but a few of the many cases so holding.”

61 Fed. (2d) 530.

D. The Damages Claimed by Appellant Are *Consequential Damages* Incident to the Operation of the Machinery, and the Written Contract Between the Parties Provides That Appellee Shall Not Be Liable for Such Damages.

As above noted, the written contract between the parties not only specifies the remedy which appellant may pursue for any alleged breach of warranty, but also provides that appellee shall not be liable for damages or consequential damages incident to the operation of the machinery. This latter provision of the contract, without regard to the exclusive character of the remedy specified, suffices to sustain the order granting appellee's motion for summary judgment because, as will hereafter appear, the damages which appellant seeks to recover by its amended complaint are damages or *consequential damages* incident to operation of the machinery.

General damages, as distinguished from *special* or *consequential damages*, for breach of warranty as to the quality or fitness of personal property are measured by the excess, if any, of the value the property would have had if as warranted over its value in its defective condition.

Lichtenthaler v. Samson Iron Works, 32 Cal. App. 220, 224, 162 Pac. 441;

Armstrong Rubber Co. v. Griffith (C. C. A. 2), 43 Fed. (2d) 689, 690;

Wells v. Oldsmobile Co., 147 Ore. 687, 35 Pac. (2d) 232, 234;

22 Cal. Juris. 1018;

24 R. C. L. 253, 254;

55 C. J. 872;

2 *Williston on Sales* (2d Ed.) 1537-1538;

Uniform Sales Act, §69, subd. 7.*

By its amended complaint appellant does not seek general damages, and such pleading contains no allegations as to the difference in value between the machinery as delivered, and as warranted, which allegations, of course, are essential to establish the measure of general damages.

Williams v. Lowenthal, 124 Cal. App. 179, 189, 12 Pac. (2d) 75;

Klein Structural Steel Co. v. John J. Pool Co., 26 Ohio App. 420, 160 N. E. 520.

*The Uniform Sales Act was adopted in California in 1931 (Stats. 1931, ch. 1070—Civ. Code 1933, §§1721-1800) and was adopted in Wisconsin in 1911 (Laws 1911, ch. 549—Stats. 1939, §§121.01-121.79). Subd. 7 of §69 above referred to reads:

"In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Moreover, it affirmatively appears from the face of the contract that it was one of *conditional sale*, whereunder appellee, as seller, retained title pending payment of the deferred portion of the purchase price. It is not alleged in either the original or the amended complaint that the purchase price has been fully paid; non-payment of the full purchase price is averred in the answer. [Tr. p. 48.] Under such circumstances appellant, not having acquired title, could not maintain an action to recover general damages for breach of warranty.

Lichtenthaler v. Samson Iron Works, supra, 32 Cal. App. 224;

Sterrett Operating Service, Inc., v. Baker (C. A. Dist. Col.), 70 Fed. (2d) 780, 781;

Baca v. Fleming, 25 N. M. 643, 187 Pac. 277, 279;

English v. Hanford, 75 Hun. 428, 27 N. Y. Supp. 672.

In the absence of a contractual provision limiting or abrogating the seller's liability therefor, a buyer may recover *special* or *consequential damages*, provided the same were within the contemplation of the parties, *e. g.*, loss of profits, time and money expended in repairing machinery, loss of products spoiled by use of machinery, and loss of business or customers. To quote from Professor Williston's work on sales:

“Consequential Damages for Breach of Warranty of Quality.

“One who warrants goods to possess a certain quality is held to an extensive liability for *consequen-*

tial damages for breach of the warranty, perhaps on the ground that such a person should more readily foresee injurious consequences from a breach of his obligation than an ordinary contractor; perhaps because of the close relation between an action for breach of warranty and the law of torts. If *consequential damages* are natural consequences of a breach of warranty, the plaintiff is generally allowed to recover them. If one sells an animal warranting it to be sound, when in fact it is infected with disease, the seller is responsible for *expense incurred for medicine and medical attendance, and for damages resulting from a communication of the disease to the buyer's other animals* in an action on the warranty. Unwholesome food sold to human beings under an expressed or implied warranty, and hay or grain similarly sold for the purpose of being fed to cattle which contains a substance which poisons the buyer's cattle, subjects the seller to responsibility for the consequences. One who sells barrels with a warranty is liable for the buyer's *loss of the contents owing to defects* in the barrels. The buyer of heating apparatus which fails to fulfill a warranty may recover for the *loss caused by having the building without heat*. One who purchases warranted machinery which owing to breach of the warranty cannot be used may recover *for the loss of time and labor* before the machine can be replaced. * * * Delay due to failure to furnish goods as warranted and *money or labor expended* in reasonable efforts making warranted goods conform to the just requirement of the buyer may be recovered for. *Injury caused by using warranted goods in manufacturing other articles is recoverable* unless the buyer was negligent or unreasonable in failing to discover the defects before using the goods."

See, to the same effect:

2 *Sedgwick on Damages* (9th Ed.) 1602;

2 *Sutherland on Damages* (4th Ed.) 2403, 2413
et seq.;

55 *C. J.* 868 *et seq.*;

22 *Cal. Juris.* 1024 *et seq.*;

24 *R. C. L.* 256 *et seq.*

A casual reference to the items of damages which appellant seeks to recover by its amended complaint [Tr. pp. 31-40] suffices to demonstrate that all of such damages are of the character classified by Professor Williston as *consequential damages*. It is equally apparent that all of the damages which appellant seeks to recover are damages incident to the operation of the machinery, viz., wages paid for extra labor required to operate the machinery [Tr. pp. 31-33]; beer lost because the machinery did not properly pasteurize it or filled bottles too full [Tr. pp. 33-35, 37-38]; loss of profits and goodwill occasioned because beer, which the machinery imperfectly pasteurized, reached the hands of appellant's customers [Tr. pp. 35-36]; cost of labor and parts for repairing machinery and excessive cost of operation [Tr. pp. 36-39]; and time and wages lost due to defective operation of machinery [Tr. pp. 39-40].

Appellant makes no contention to the contrary, except that appellant insists that the damages it seeks to recover are *special damages* (Br. p. 5) and not *consequential damages* (Br. pp. 13-23).

Whether the damages be characterized as *special* or *consequential* is immaterial, because those terms are generally used as being synonymous.

“Consequential or special damages are those that flow naturally, but indirectly, from the wrongful act.”

Pearson v. Spartanburg County, 51 S. C. 480, 29 S. E. 193, 194.

This is particularly true in the law of sales. Thus, as appears from the foregoing quotation from his work on sales, Professor Williston classifies damages such as those appellant seeks to recover as *consequential damages*. Damages of this character are also classified as *consequential* in the article on sales in *California Jurisprudence* (22 Cal. Juris., p. 1024) and in numerous decisions.

“Direct damages are always recoverable, and *consequential* losses must be compensated if it can be determined that the parties contracted with them in view.”

Cohn v. Bessemer G. E. Co., 44 Cal. App. 85, 91, 186 Pac. 200.

“Special circumstances, however, may warrant the allowance of *consequential damages* which are the natural result of conditions deemed to have been reasonably within the contemplation of the contracting parties.”

Lewin v. Pioneer Hatchery, 99 Cal. App. 473, 479, 278 Pac. 902.

To the same effect see:

Luitweiler etc. Co. v. Ukiah etc. Co., 16 Cal. App. 198, 209, 116 Pac. 707 (decision cited by appellant, Br. p. 32);

Jones v. Holland Furnace Co., 188 Wis. 394, 206 N. W. 57, 59;

Martin v. Southern Engine & Pump Co., *supra*, 130 S. W. (2d) 1067;

Wallich Ice Machine Co. v. Hanewald, *supra*, 267 N. W. 751;

Washington & O. D. Ry. v. Westinghouse Electric & Manufacturing Co., *supra*, 89 S. E. 133;

1 *Sutherland on Damages* (4th Ed.), §§45 and 46, pp. 170 *et seq.*

Other authorities prefer to designate this type of damages as *special damages*.

Wells v. Oldsmobile Co., *supra*, ³⁵⁷25 Pac. (2d) 234;

Permutit v. Massasoit Manufacturing Co., *supra*, 61 Fed. (2d) 530;

Globe Refining Co. v. Landa Cotton Oil Co., *supra*, 190 U. S. 541-2;

2 *Benjamin on Sales* (6th Am. Ed.) 1141.

A number of authors use both terms to designate this type of damages. Thus the author of the article on sales in *Ruling Case Law* has entitled the pertinent section "Special or Consequential Damages" (24 *R. C. L.* §536, p. 256). The identical title is employed in the *New California Digest* for the section in that work relating to such damages. (21 *New Calif. Digest*, p. 236.) In *Cohn v. Bessemer G. E. Co.*, *supra*, the California District Court of Appeal refers to this type of damages as "special damages" (44 Cal. App. 90) and as "consequential or special damages" (44 Cal. App. 90), and also as "conse-

quential damages” (44 Cal. App. 91). Similarly in the article on sales in *Corpus Juris* the author states:

“Where a machine delivered proves worthless or defective, the buyer may recover *special and consequential* damages suffered in connection with his attempt to operate the machine.”

55 C. J. 1189.

The important consideration, however, is not whether the damages appellant seeks to recover should be classified as *special* or *consequential* damages, but that such damages are clearly damages incident to the operation of the machinery, and that their recovery is precluded by the clause in the written contract between the parties, which reads:

“Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods.”

A case squarely in point is *Martin v. Southern Engine & Pump Co.*, *supra*. In that case the seller of cooling equipment, including an engine for the operation thereof, sued for the purchase price. The buyer cross-complained for loss of ice occasioned by reason of the failure of the cooling equipment to function, which, in turn, resulted from the failure of the engine to deliver the warranted power. The contract of sale contained the following provision:

“It is a further condition of this contract that the Southern Engine & Pump Company shall not be responsible for original damages in the use of this machinery, nor in any event for *consequential damages*.”

130 S. W. (2d) 1066.

The trial court refused to permit the buyer to introduce evidence as to the alleged loss of ice, on the ground that

such loss constituted *consequential damages*, for which the seller was not liable under the above-quoted provision of the contract. The Texas Court of Appeals affirmed this ruling on the ground that it is "well settled that parties to such a contract of sale may expressly provide for a limitation of the rights of the buyer, in case of a breach of the stipulated warranty." (130 S. W. (2d) 1066.) The Court held further:

"As a corollary, it seems furthermore plain that the damages the appellant here thus sought to both prove up and recover were *consequential ones*, within the declared legal meaning of that term in the quoted exemption agreement between them."

130 S. W. (2d) 1066-1067.

Another case practically on all fours with that at bar is *Wallich Ice Machine Co. v. Hanewald, supra*. The contract of sale there under consideration related to refrigerating equipment and provided that the seller should not be responsible for any *consequential damages* resulting from any defect in the equipment. The buyer, when sued for the price, counterclaimed for meat alleged to have been spoiled by reason of the failure of the equipment to function. The Supreme Court of Michigan held that the loss of meat constituted an item of *consequential damages* and that the seller was not liable therefor, saying:

"* * * conclusively defendant cannot assert this item as a recoupment because of the expressed provisions of the contract under which he purchased the refrigerating apparatus. The contract provision is:

'The company, however, shall not be responsible for any *consequential damages* or loss of refrigerant resulting from any such defect' (in materials or workmanship)."

267 N. W. 751.

In *Massey-Harris Harvester Co. Inc. v. Hammer, supra*, a conditional seller of a thresher brought an action to recover its possession because of non-payment of the purchase price. The buyer answered to the effect that delay in delivering the thresher in a condition to be used caused defendant losses in excess of the balance due on the purchase price. The contract contained a clause exempting seller from liability for damages. In overruling the buyer's claim for damages the Supreme Court of Kansas said:

“But here the contract includes this paragraph, which is equally fatal to the defendants' recovery:

‘It is further understood and expressly agreed that any breach of the warranty or any omission on the part of the vendor does not confer any right of damage for delay or loss of work or earnings, or for other damages. In no event shall the vendor be liable otherwise than for the return of cash and notes actually received by it for the machinery herein described.’

“Provisions of this character have been before the courts more frequently than that passed upon in the *Gonder* case, and their validity is well established. 2 Williston on Sales, Sec. 491, Note 67; *Scott v. Vulcan Iron Works Co.*, 122 P. 186, 31 Okl. 334; *Avery Planter Co. v. Peck*, 89 N. W. 1123, 86 Minn. 40; *Austin Co. v. Tillman Co.*, 209 P. 131, 104 Or. 541, 30 A. L. R. 293.” (244 Pac. 1043.)

See to the same effect:

Barnard & Leas Manufacturing Co. v. Smith, supra;

Washington & O. D. Ry. Co. v. Westinghouse Electric & Manufacturing Co., *supra*;

Crandall Engineering Co. v. Winslow Marine Railway Co., *supra*.

III.

Reply to Appellant's Points.

Appellant's principal contentions in support of its appeal from the District Court's order granting appellee's motion for summary judgment are:

First: That under the rule of *ejusdem generis* the clause of the contract limiting appellee's liability must be construed as having application only to *consequential damages*. (Br. pp. 8-12.)

Second: That the damages alleged in the amended complaint are not *consequential damages*. (Br. pp. 13-23.)

It is submitted neither contention has merit.

A. The Rule of *Ejusdem Generis* Is Not Applicable to the Clause of the Contract in Question.

Concededly, the rule of *ejusdem generis* requires that words of general description following words of particular description be interpreted as applying to things of a similar character.

In re Great Western Petroleum Corporation, 16 Fed. Supp. 247, 249.

The rule, however, has no application to the clause in question, which reads:

"Seller shall not be liable for delays, damages or consequential damages, in shipment, erection or in operation of above goods."

The word of alleged general description, viz: *damages*, does not follow, but precedes, the term of alleged particular description, viz: *consequential damages*. Moreover, the rule of *ejusdem generis* has application where several

terms of particular description are followed by a term of general description, but not in situations where there is only one term of particular description.

City of Los Angeles v. Superior Court, 2 Cal. (2d) 138, 140; 39 Pac. (2d) 401.

If the term “consequential damages” has the meaning for which appellant contended below, namely, damages occasioned by an intervening cause and hence not recoverable in any event from appellee [Tr. pp. 85-86], appellant’s contention for the application of the rule of *ejusdem generis* has not even colorable force. That rule can have application only where the several terms employed refer to things of the same character, and not where the term of alleged general description refers to something different from the term or terms of alleged particular description. Manifestly, if *consequential damages* refer to losses not recoverable, they are not of the same character as *damages*, which, of course, mean recoverable losses.

A further reason for the non-application of the rule of *ejusdem generis* is that such rule is only an aid to construction, and is never to be applied to a contract unless such application assists in arriving at the intention of the parties.

“The rule *ejusdem generis*, the rule *exclusio unius*, the rule invoked in this case that ‘*the particular governs the general*,’ and perhaps other rules still, are mere subordinate and auxiliary formulas intended to assist in the application of *the basic rule that the intent of the parties governs*. Neither in law nor in

ordinary logic can there be an inflexible rule by which parties are arbitrarily held *to forego a general requirement merely because they also state a particular one.*" (*Drainage Commission v. National Contracting Co.*, 136 Fed. 780, 794.)

In stipulating against liability for damages incident to the operation of the machinery appellee specified in the contract "delays or damages," which might have been sufficient, but as a further precaution added "or consequential damages." There is no justification for contending that such precautionary addition had the effect of nullifying the preceding words "delays or damages"; to so hold would be to thwart, not to give effect to, the intention of the parties, which obviously was to exempt defendant from liability for all damages of whatever character incident to the operation of the machinery.

B. The Term "Consequential Damages", as Used Generally in Sales Agreements and in the Instant Contract, Means Exactly the Type of Damages Appellant Seeks to Recover.

Even if the rule of *ejusdem generis* were deemed applicable and were applied to the clause in question, as appellant urges, the clause is nevertheless sufficient to preclude appellee's liability for the damages appellant seeks to recover if such damages are *consequential damages*.

Appellant admits that the damages it claims are special damages. (Br. p. 5.) As above noted, the terms "special damages" and "consequential damages" are used interchangeably in the law of sales to designate exactly the same type of damages. Appellant nevertheless insists that the damages it seeks are not *consequential damages*. (Br. pp. 13-23.)

In the District Court appellant contended that *consequential damages* are “those which are attributable to the interposition of some independent cause other than the acts of the defendant” [Tr. p. 85]; that the term “consequential damages” had such meaning in Wisconsin and that the instant contract must be interpreted in accordance with the Wisconsin law. Appellant cited no Wisconsin decision so defining *consequential damages* (because, as hereinafter appears, the Wisconsin Supreme Court uses that term as synonymous with *special damages*), but relied principally upon three Federal cases, only one of which arose in Wisconsin, and none of which was remotely in point, namely:

United States v. Chicago B. & Q. R. Co., (C. C. A. 8) 82 Fed. 131;

Christman v. United States (C. C. A. 7), 74 Fed. (2d) 112;

United States v. Chicago B. & Q. R. Co., (C. C. A. 7), 90 Fed. (2d) 161.

The only question of damages presented or considered in any of these cases concerned damages recoverable by the owner of property taken or injured by the Government in the exercise of the right of eminent domain. The rights of the litigants were governed by the Federal statutes and Constitution, and the law of Wisconsin was not germane, nor was it referred to or discussed. It is true that in such decisions the term “consequential damages” was used in contradistinction to *direct* or *proximate damages*, and as referring to items of damage attributable, not to the act of the Government, but to an *independent cause*, and hence not recoverable from the Government. Concededly, the term “consequential damages” is some-

times used in that sense. 17 C. J. 711; 1 Sedgwick on Damages (9th ed.) §110, p. 193. That the term was so used in the eminent domain cases relied upon by appellant plainly appears from the following portion of the opinion in *United States v. Chicago B. & Q. R. Co.*, *supra*:

“Ordinarily, ‘consequential damages’ are those which do not arise as an *immediate, natural, and probable result of the act done*, but arise from the interposition of *an additional cause*, without which the act done would have produced no harmful result; while ‘*proximate damages*’ are those which accrue directly and in natural sequence, and as a specific (hurtful) result from the act done, without the intervention of an *independent cause*.” (82 Fed. (2d) 136.)

As the District Judge pointed out in his memorandum decision, to interpret “consequential damages” as used in the clause of the contract in question to mean damages occasioned by an independent cause and not attributable to appellee, and hence for which it could not be liable, would make the inclusion of the term “consequential damages” in the clause an absurdity, and, furthermore, if appellant’s contention for the application of the rule of *ejusdem generis* were also upheld, would make the entire clause meaningless. [Tr. pp. 85-86.] The District Court, therefore, rejected appellant’s contention respecting the meaning of the term “consequential damages” in accordance with the well-settled rule that contractual provisions must be interpreted to give them effect and not to make them meaningless. [Tr. p. 86.]

Apparently realizing the futility of contending that the term “consequential damages” as used in the contract

means non-recoverable damages, appellant has abandoned such contention on this appeal and now urges acceptance of the following definition of "consequential damages":

"Consequential damages are those which are special rather than general, and are caused by the concurrence of some other event attributable to the same origin and cause, that is, attributable to the negligent act of defendant, so continuous in its nature that the concurrent wrongful act which precipitated the damage will not be deemed an independent wrong, but as conjoining with the original act of defendant in creating the disastrous result." (Br. p. 13.)

We think this definition is unintelligible, except to the extent that the first two lines declare consequential damages to be special damages, as distinguished from general damages. Certainly the balance of the definition cannot be intelligently applied in an action such as that at bar to recover damages for breach of warranty. Appellee is not charged with any "*negligent act*," but with breach of warranty, a contractual obligation. We are not concerned here with any question as to what damages might be recovered from a tortfeasor for a negligent act or how his liability might be extended to cover an injury precipitated by "the concurrent wrongful act" of a third party.

Whatever appellant may mean by its definition of *consequential damages*, no authority has been cited which supports it. Without exception, the cases referred to in this portion of appellant's brief as bearing upon the

question of *consequential damages* (Br. pp. 13-23) dealt with claims sounding in tort. Only two of such decisions, namely, *Loiseau v. Arp*, 21 S. D. 566, 114 N. W. 701, and *Christman v. United States, supra*, so much as mention the term “consequential damages”, and in both it was held that the damages claimed were not the immediate or natural and probable result of the alleged wrongful act but arose as an “incidental” or “remote” consequence, and hence were not recoverable. (74 Fed. (2d) 114, 114 N. W. 703.)

The remaining cases cited by appellant were actions for *personal injuries* or *wrongful death*. (Br. pp. 18-23.) In none of them was the term “consequential damages” defined or even used. We have no quarrel with the legal principles declared in such decisions respecting the liability of joint tort feasons whose concurrent acts of negligence may contribute to personal injuries or wrongful death; manifestly, such principles have no bearing on any of the issues presented by this appeal.

It is not difficult to understand appellant's failure to cite any authority which supports its definition of *consequential damages*; such definition is obviously the invention of appellant's counsel. The important consideration, however, is that the term “consequential damages” is employed in sales agreements, and in many decisions and treatises dealing with the matter of damages recoverable for breach of warranty, to designate exactly the type of damages which appellant claims by its amended complaint. A number of authorities holding damages of this type to

be *consequential damages* are cited and quoted on pages 25 to 31 of this brief. Such authorities include the authors of *Williston on Sales*, the article on Sales in *California Jurisprudence*, the article on Sales in *Ruling Case Law* and the article on Sales in the *New California Digest*, and the Courts of California, Michigan, Texas, Virginia and Wisconsin. Accordingly, it cannot be seriously contended that the parties to the instant sales agreement used the term "consequential damages" to designate any different type of damages.

Since appellant argues that the instant contract must be "interpreted according to the law and usage of Wisconsin" (Br. p. 18), particular note should be made of *Jones v. Holland Furnace Co.*, *supra*. In that case the Supreme Court of Wisconsin affirmed a judgment obtained by the buyer of a furnace for breach of warranty as to the sufficiency of the furnace to heat the buyer's house. The contract of sale contained no limitation of the seller's liability. One of the items of damages allowed by the trial court was the sum of \$400 on account of the plaintiff's loss of roomers who left because the house was improperly heated. In the report of the case such loss is referred to as an item of "consequential damages" and in affirming the judgment the Supreme Court said:

"We find no error as to the allowance of *consequential damages*. It was undisputed that the roomers left because the rooms were not properly heated, and the consequent loss to the plaintiff was established by the proof." (206 N. W. 59.)

C. The Allegations of the Amended Complaint Do Not Show Any Practical Construction of the Contract by the Parties, and the Clause of the Contract in Question, in Any Event, Is Free From Ambiguity.

Appellant argues (Br. p. 24) that the parties so construed the contract as to render appellee liable for the damages appellant seeks to recover. Neither the amended complaint nor any other pleading contains allegations showing a practical construction of the contract, nor any suggestion that the contract is in any respect ambiguous so as to necessitate or warrant the introduction of collateral evidence to establish its meaning. Appellant's entire argument on this point is based upon the allegation in the amended complaint to the effect that appellee devoted some three hundred thirteen hours without charge to appellant in an attempt to adjust the machinery. [Tr. p. 30.] Parenthetically, it may be noted that this allegation of the amended complaint is denied. [Tr. p. 48.] For the present purposes, however, let it be assumed that after delivery of the machinery appellee did devote a considerable amount of time to adjusting and repairing the same for which it made no charge to the appellant. Such action on the part of appellee is in no sense inconsistent with its disclaimer of liability for the damages appellant seeks by its amended complaint, and hence could not amount to a practical construction of the agreement.

As has been heretofore shown, the damages appellant claims are consequential or special damages incident to the operation of the machinery. There are a number of possible reasons why a seller of machinery might adjust or repair the same without charge to the buyer, irrespective of his liability or non-liability for such special or consequential damages:

(a) The seller might make the repairs or adjustments without charge to the buyer not because legally obligated to do so but in order to preserve the buyer's goodwill.

(b) The seller might make such repairs or adjustments without charge to the buyer in order to escape liability for *general damages* (*i. e.*, the difference between the value of the machinery as delivered and the value it would have had if as warranted).

(c) The seller might make the adjustments or repairs without charge to the buyer in order to satisfy a liability such as that imposed by the instant contract to replace or give credit for defective parts.

Certainly, no seller of machinery motivated by reasons such as any of those above set forth, who adjusted or repaired the machinery without charge to his purchaser, would thereby admit liability for *special* or *consequential damages* which the buyer might sustain or claim.

We do not question the well-settled rule that a practical construction of a written contract by the parties to it is an excellent means of ascertaining what the parties intended. Neither this rule nor any other rule of construction, however, has any application unless the contract is ambiguous. (*Pierce v. Merrill*, 128 Cal. 464, 472; 61 Pac. 64.)

The instant contract is free from ambiguity. It clearly states that appellee shall not be liable for damages or consequential damages incident to the operation of the machinery. There is no occasion for construction or the application of any rule of construction. The plain language should be given effect.

- D. No Question as to the Statute of Limitations or Laches Was Presented by the Motion for Summary Judgment, Nor Decided by the District Court, Nor Is Any Such Question Presented by This Appeal.**

Appellant's Fourth Point, as set out in its opening brief is entitled:

"The Plaintiff's Action Is Not Barred by the Statute of Limitations or Laches, It Having Retained the Machinery at Defendant's Request, in Order to Afford the Defendant an Opportunity to Place the Machinery in Such Working Order as to Comply With Defendant's Representations and Plaintiff's Requirements, and Plaintiff Having Deferred the Commencement of Its Action in Reliance Upon Defendant's Representations That It Would Place the Machinery in Such Working Order as to Comply With Defendant's Representations and Plaintiff's Requirements." (Br. p. 27.)

Both this title and the argument which follows are immaterial. No question of laches or the statute of limitations was presented by the motion for summary judgment and hence no such question can be properly considered on this appeal.

- E. It Is Immaterial Whether Any Warranty, in Addition to That Expressed in the Written Contract, Could Be Implied; the Sole Question Is as to Appellee's Liability for the Damages Claimed by Appellant in Its Amended Complaint.**

The heading to the Fifth Point urged by appellant in its brief reads:

"Surrounding Circumstances Upon Which an Implied Warranty Is Predicated May Be Shown by Parol Testimony Notwithstanding the Contract Was

Reduced to Writing and Contained a Statement That the Parties Were Not Bound by Any Verbal Understanding, the Contract Not Having Contained a Detailed Statement of the Warranty, or a Detailed Description of the Goods.” (Br. p. 29.)

We think this heading is not an accurate statement of law, and that it is in any event inapplicable to the case at bar.

The sales agreements considered in the California cases cited by appellant (Br. pp. 29-33) were entered into prior to 1931 when California enacted the Uniform Sales Act. (Calif. Stats. 1931, Chap. 1070.) The majority of the authorities who have had occasion to consider the question under the Uniform Sales Act holds that where a sales agreement has been reduced to writing, contains an express warranty and recitals indicating that the contract expresses the entire agreement of the parties, no warranty will be implied.

S. F. Bowser & Co. v. Birmingham, 276 Mass. 289, 177 N. E. 268, 270;

Sterling-Midland Coal Co. v. Great Lakes Coal & C. Co., 334 Ill. 281, 165 N. E. 793, 796-797;

McCabe v. Standard Motor Construction Co., 106 N. J. Law. 227, 147 Atl. 466, 467;

Lasher Co. v. La Berge, 125 Me. 475, 135 Atl. 31, 32;

Graves Ice Cream Co. v. Rudolph W. Wurlitzer Co., *supra*, 100 S. W. (2d) 822.

If, as appellant insists (Br. p. 18), the instant contract is to be interpreted according to the laws of Wisconsin, why does appellant rely exclusively upon California deci-

sions? The answer, of course, is that the Wisconsin decisions do not support appellant's contentions. As has already been noted, the Supreme Court of Wisconsin in *Jones v. Keefe, supra*, after ruling that evidence of any oral representations would not even be admissible, said with respect to a contract such as that at bar, which contained a recital that no verbal understandings were binding unless incorporated therein:

"The clause of the contract that no verbal agreements were entered into not expressed in writing is *expressive of the intent and purpose* of the parties *that all the terms and conditions of the sale are embraced in it.*"

150 N. W. 955.

It is entirely immaterial, however, whether appellant can rely upon an implied warranty, in addition to the express guarantee contained in the contract, or upon both such express guarantee and such implied warranty. The amended complaint charges that the machinery did not work as warranted and details the items of damage alleged to have resulted from such breach of warranty. The existence of a warranty is admitted. The sole question presented by the motion for summary judgment and by this appeal is whether appellee is liable for the damages claimed in view of the provisions of the written contract specifying the remedy available to appellant for breach of warranty and stipulating that appellee shall not be liable for damages or consequential damages incident to the operation of the machinery. The answer to this question is in no wise dependent upon whether the warranty was express or implied, or both.

F. There Is No Inconsistency Between the Guarantee, as Expressed in the Contract, and the Clause Therein Contained Exonerating Appellee From Liability for Damages Incident to the Operation of the Machinery.

The final point urged by appellant in its brief is that the clause of the contract exempting appellee from liability for damages and consequential damages incident to the operation of the machinery is inconsistent with the guarantee set forth therein. (Br. p. 34.)

There is no such inconsistency. Appellant's remedy in the event of breach of warranty is clearly specified in the contract, namely: the right to return and receive credit for defective parts.

A similar contention of inconsistency was made in *Martin v. Southern Engine & Pump Co., supra*. In disposing of such contention, the Texas Court of Civil Appeals there said:

“* * * in other words, there was no necessary nor apparent repugnancy or inconsistency between the two provisions, they being construable together as simply meaning that, while the first warranted the engine to pull the Frick Compressor ‘at 200 head-pressure, Speed 360 RPM, Engine Speed 1200’, the second at the same time negated any liability of the appellee for *consequential damages* suffered by the appellant for any breach of such warranty;”

130 S. W. (2d) 1066.

Conclusion.

The short answer to appellant's appeal is that it was not timely taken and hence this Court does not have jurisdiction. The complete answer on the merits of the controversy is that the provisions of the written agreement between the parties preclude recovery of the damages claimed by appellant. As the District Judge said in his memorandum decision [Tr. p. 85], appellant by the terms of the contract "waived the damages it now seeks to recover."

Appellee's motion for summary judgment was properly granted by the District Court, and the ruling should be affirmed.

Respectfully submitted,

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No. 10056.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,

Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLANT'S CLOSING BRIEF.

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FILED
MAY 25 1942

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I.

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Statement in Respect to Issues of Fact and Law
Involved.

All of the facts pertinent to the determination of the questions presented on this appeal are fully set forth in our opening brief and in an extended statement of the case in the appellee's brief. From these statements it appears that this is an action for damages for some \$214,000.00, arising from the breach of defendant's implied and express warranty, in respect to certain beer bottling machinery sold by the appellee, a resident and citizen of the state of Wisconsin to appellant, a resident and citizen of the state of California. Under the circumstances we feel there is no occasion to here repeat the facts from which this litigation arose.

An examination of the appellee's brief discloses that the only point raised in its brief, which has not been fully covered by our opening brief, is the contention that this Court has no jurisdiction over this appeal for the reason, as appellee contends, that the notice of appeal was not filed in time. Accordingly we will confine this brief to a consideration of this single point.

ARGUMENT.

I.

The Appeal Having Been Taken From the Summary Judgment Filed and Entered October 13, 1941, and the Notice of Appeal Having Been Filed January 13, 1942, the Notice of Appeal Was Filed Within the Required Three Months After the Entry of the Judgment Appealed From.

The appellee's contention that the notice of appeal was filed too late is predicated upon the erroneous assumption that the three months' period in which the appellant might appeal from the summary judgment commenced to run from the date of the order granting appellee's motion for a summary judgment, rather than from the date of the filing and notation of the entry of the judgment from which the appeal was taken.

Section 230 of Title 28, U. S. C. A., provides as follows:

"230. Time for making application for appeal or writ of error. No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Rule 58 of the Rules of Civil Procedure is in part as follows:

“The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry.”

The notice of appeal, together with its filing mark, are as follows:

“NOTICE OF APPEAL

Notice is hereby given that Monarch Brewing Company, a corporation, plaintiff in the above entitled action, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit, from the final judgment on plaintiff's claim, entered in this action on October 13, 1941.

Dated: January 13, 1942.

Alfred F. MacDonald
Bodkin, Breslin & Luddy
By G. Stuart Silliman
Attorneys for Plaintiff.

(Endorsed): Filed and mailed copy to Atty. for def. Jan. 13, 1942. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy.” [Tr. of Record, fol. 100.]

It thus appears that the appeal was taken from the summary judgment, entered October 13, 1941, and not from the order granting the motion for summary judgment, which order was entered October 8, 1941.

The entries in the docket showing the date of the order granting appellee's motion for summary judgment to be October 8, 1941, and the date of the entry of the sum-

mary judgment to be October 13, 1941, is set forth in the transcript on appeal, as follows:

DOCKET—UNITED STATES DISTRICT COURT

Docket 1035-Y	Title of Case	Attorneys
		For Plaintiff
	Monarch Brewing Com- pany, a corporation,	Alfred F. MacDonald Bodkin, Breslin & Luddy
	vs	
	Geo. J. Meyer Manufac- turing Co., a corpora- tion	For Defendant: Lawler, Felix & Hall

Date	Filings-Proceedings
ENTRY OF OCT. 8, 1941	
Oct. 8 1941	Ent. order grtg. defts. mo. for summary judg- ment. Notified Attys. Fld. memo. decision.
* * * * *	* * * * *
ENTRY OF OCT. 13, 1941	
Oct. 13, 1941	Fld. & ent. judgment pltf. take nothing & deft. have costs. D & I Judgt. Entered at C. O. B. 7, page 94. Notified Attys.
* * * * *	* * * * *

It thus appears that the notice of appeal was filed within the required three months after the filing and entry of the notation in the civil docket of the judgment from which the appeal was taken.

None of the cases cited by appellee supports their contention that the notice of appeal was filed too late, for those cases simply consider the question of what are final and therefore appealable orders, but none of them consider the question as to when the three months period within

which an appeal from a summary judgment may be taken commences to run.

Neither do any of the cases cited by the appellee consider the appealability of an order granting a motion to dismiss an action upon the ground that the complaint fails to state facts sufficient to constitute a cause of action, nor do any of them consider the appealability of an intermediary order, which simply recites the granting of the motion for a summary judgment, but which order does not by its terms attempt to adjudicate or declare the rights of the parties.

Rule 56 of the Rules of Civil Procedure provides as follows:

“(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.”

Pursuant to this provision, appellee served a notice of motion “for summary judgment in its favor.”

The pertinent portion of the order made and entered October 8, 1941 (at which time the appellee contends the three months period, in which appellant might file its notice of appeal herein, commenced to run) is as follows:

“* * * the Court now enters the following order:

The motion of the defendant *for summary judgment* in its favor as to each and every claim asserted against the defendant by plaintiff's amended com-

plaint, filed August 9, 1941, hereofore argued and submitted, is now decided as follows:

The said motion is hereby granted upon the ground that by the terms of the contract of sale of the machinery, dated February 14, 1938, the plaintiff waived the damages it now seeks to recover." [Fol. 92.]

It is clear that the order of October 8, 1941, was not intended by the Court to constitute the final judgment in the action, for it simply declared that the motion "for summary judgment" is hereby granted. In making such order the court clearly contemplated that a formal judgment should be entered pursuant to such order, which was done on October 13, 1941.

In *Continental Nat. Bank v. National City Bank*, 69 Fed. (2d) 312, plaintiff, brought an action for damages arising from defendant's failure to honor plaintiff's drafts. On August 10, 1932, an entry was made in the minutes of the trial judge and also on the record, which, after making certain recitations, declared as follows:

"And it is further ordered that judgment be for plaintiff in the first and second causes of action alleged in the first amended complaint for the sum of Twenty Four Thousand Dollars (\$24,000.00) with interest at the rate of seven per cent (7%) per annum from May 5th, 1924, with costs of suit.'"

On September 5, 1932, the court signed its findings of fact and conclusions of law, and judgment, which were filed the following day. On August 31, 1932, the defendant moved for a declaration of law to the effect that plaintiff was not entitled to recover upon the admitted facts, because of its failure to comply with a letter of credit. The court, in holding such application for a

declaration of law was made before the rendition of the judgment, because the order of August 10, 1932, above quoted, did not constitute a judgment but an order for a judgment, said at page 317:

“In the instant case, while made after the entry of the trial judge’s opinion with the order that ‘judgment be for plaintiff,’ they were made before the rendition on September 5th and the entry on September 6th of the judgment itself. The order of August 10th, we are satisfied, was neither intended nor regarded as the rendition of a judgment. It was the announcement by the trial judge that he had concluded to direct a judgment in favor of the plaintiff; the ordering part was ‘for a judgment’ which he would thereafter direct as distinguished from a present judgment.”

So in the present case the order of October 8, 1941, was but an order for a judgment for which the appellee had moved the court and not the judgment itself.

Furthermore, inasmuch as the motion for summary judgment was predicated on the alleged insufficiency of the complaint to state a cause of action, the appellee correctly states at page 6 of its brief:

“For the purposes of this appeal it is unnecessary to give detailed considerations to the contents of the answer.”

Such being the case, the same rule must be applied in determining the appealability of an order granting the motion for summary judgment, and the time in which an appeal may be taken from the judgment entered pursuant to the granting of such motion, as are applicable to appeals from motions of dismissal on the grounds that the complaint fails to state a claim on which relief can be

granted, for in this case, under the circumstances, the motion for summary judgment served the purpose of a motion to dismiss, that is a general demurrer to the complaint, on the grounds that it did not state facts sufficient to constitute a cause of action.

Section B of Rule 12 of the Rules of Civil Procedure, provide as follows:

“Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted.”

This is a counter-part of the former Equity Rule No. 29, which abolished demurrers and provided for testing of the sufficiency of complaints by means of motions to dismiss.

In speaking of the effect of the above quoted provision of Rule 12, James A. Pike, in “The New Federal Rules of Civil Procedure,” 12 Cal. State Bar Jour. 223, as quoted at page 31 of Balter’s Rules of Civil Procedure, said:

“‘Much dead wood has been eliminated from the procedural structure by the rule on defenses. The demurrer has been abolished. All defenses, in law or fact, or as to jurisdiction, process or venue, are properly made in the answer or other responsive pleading. But certain objections may be made by motion. Notable among these is the defense that the plaintiff has failed ‘to state a claim upon which relief can be granted.’ This is, of course, the subject-matter of the general demurrer in California.”

In *City of San Francisco v. McLaughlin* (C. C. A. 9), 9 Fed. (2d) 390, an appeal was taken from an order granting the motion to dismiss a bill in equity. The court in dismissing the appeal from such order because it was not a final order from which an appeal would lie, said at page 390:

“The mere granting of a motion to dismiss under this rule (Former Equity Rule 29), unless followed by a final decree, amounts to nothing more than a detetrmination on the part of the court that the bill is open to one or more of the objections urged against it, and the order on the motion is not final, any more than is an order sustaining a demurrer to a complaint in an action at law. In either case the suit or action is still pending, and must be determined by final decree or judgment before this court can acquire jurisdiction by appeal or writ of error.” (Citing authorities.)

This rule was expressly approved in *Dyar v. McCandless*, 33 Fed. (2d) 578. In that case the plaintiff demurred to the answer which, by agreement of the parties, was considered as a motion to strike. Defendant appealed from the order which struck defendant’s answer from the files, and granted him 20 days in which to answer or otherwise plead. The court, in dismissing the appeal because the order was not appealable inasmuch as it was in effect a ruling on the demurrer to the answer on the grounds it did not state a defense, said at page 578:

“It is well settled that an order sustaining a demurrer to a complaint, or granting a motion to dismiss a complaint, without entry of judgment, is not a final order within the meaning of Section 128, Judicial Code (28 USCA 25).” (Citing authorities.)

The order of October 8, 1941, being in effect a ruling on a demurrer, or at most an order for a judgment, does not constitute a final judgment from which an appeal could be taken, and therefore the notice of appeal, filed January 13, 1942, from the summary judgment, entered October 13, 1941, was filed in time and this court has jurisdiction of this appeal.

Conclusion.

An examination of appellee's brief discloses that no consideration is given to the rule that an implied warranty is deemed to be incorporated in the written contract. Such being the law, the appellee's contention that appellant is precluded from recovering under the terms of the written contract cannot be sustained. Moreover, a proper construction of the writing restricted the exemption from liability to consequential damages caused by the concurrence of the negligence of the defendant with that of some other person or other event. The damages sought to be recovered not having been caused by the concurrence of any other event with the negligence of the defendant, but solely by reason of the acts of the defendant alone, the written contract does not preclude plaintiff's recovery on the express warranty.

The notice of appeal having been filed in time this court has jurisdiction of the appeal and the summary judgment for defendant should be reversed and the cause remanded for trial.

Respectfully submitted,

ALFRED F. MACDONALD,

BODKIN, BRESLIN & LUDDY,

Attorneys for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Appellant,

vs.

SEARS, ROEBUCK AND CO., a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR 2 - 1942

PAUL P. O'SHEA,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Appellant,

vs.

SEARS, ROEBUCK AND CO., a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 462556

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants.

COMPLAINT

(Negligence)

Plaintiff above-named complains of defendants
as follows:

First Cause of Action

I.

At all times herein mentioned United States Highway 101, also known as State Street, also known as "O" Street, between its intersections with Santa Fe Avenue and Alameda Street in the county of Los Angeles, state of California, was and now is a public highway.

II.

At all times herein mentioned plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the state of New York, duly authorized to transact and now transacting business in the state of California. More than two years prior to the commencement of the within action plaintiff duly and regularly secured from the

Industrial Accident Commission of the State of California a certificate of consent to self insure. At all times material to the within action said certificate was and now is unrevoked, and plaintiff was and now is a self insurer under and by virtue of the provisions of the Labor Code of the State of California.

III.

On or about May 13, 1940, Henderson S. Hutchinson was [2] and for some time prior thereto had been employed by plaintiff as a salesman of merchandise sold by plaintiff. As an incident of the employment aforesaid said employee was required to travel in and about the county of Los Angeles soliciting and obtaining orders for merchandise from plaintiff's customers.

IV.

On said date said employee, while performing services growing out of and incidental to his employment with plaintiff and while acting within the course and scope of his said employment, was driving and operating a motor vehicle in a westerly direction on said United States Highway 101 between its intersections with Santa Fe Avenue and Alameda Street. At said time and place defendant Lillian M. Hoyt was driving and operating a Mercury motor vehicle in an easterly direction along said U. S. Highway 101.

V.

At said time and place Lillian M. Hoyt so negligently operated, controlled and directed said Mer-

cury motor vehicle that the same was caused to and did collide with and strike with great force and violence the motor vehicle driven by said employee.

VI.

As a further, direct and proximate result of the aforesaid negligence of said defendant and as a direct and proximate result of said collision, said employee was thrown with great force and violence against the sides and other parts of the motor vehicle in which he was then driving and thereby suffered serious, severe and fatal injuries. The bodily injuries suffered by said employee as aforesaid, resulted in his death on or about May 16, 1940.

VII.

At the time of his death said employee left surviving him his wife, Harriet E. Hutchinson, and his minor son, David Keith Hutchinson. At said time said wife and said minor son were and for some time prior thereto had been totally dependent on said employee [3] for their maintenance and support.

VIII.

On or about June 15, 1940, said Harriet E. Hutchinson and said David Keith Hutchinson, as the wife and minor son respectively of said employee, filed their application with the Industrial Accident Commission of the State of California against plaintiff for adjustment of claim for compensation by way of a death benefit. On or about July 22, 1940, said

Commission duly rendered and made its award in favor of said Harriet E. Hutchinson and said David Keith Hutchinson and against plaintiff of a death benefit in the total sum of \$6,150.00. Said award has since and prior to the commencement of the within action become final.

IX.

Under and by virtue of said award, plaintiff became, now is, and until said award is fully paid will continue to be, obligated to pay to said Harriet E. Hutchinson and said David Keith Hutchinson the sum of \$6,150.00 as compensation and death benefit for the death of said employee. Plaintiff, therefore, has been and is damaged by reason of said defendant's negligent acts as aforesaid in the sum of \$6,150.00.

Second Cause of Action

I.

Plaintiff refers to paragraphs I to IX inclusive of its first cause of action and by this reference incorporates the same herein as though fully set forth.

II.

On or about May 13, 1940, defendant Ezra S. Hoyt, Jr., was the owner of that certain Mercury motor vehicle hereinabove referred to in paragraph IV of plaintiff's first cause of action.

III.

Plaintiff is informed and believes and therefore alleges that defendant Lillian M. Hoyt was driv-

ing said Mercury motor vehicle [4] at the time and place hereinabove referred to in paragraph IV of plaintiff's first cause of action with the permission and consent of said defendant Ezra S. Hoyt, Jr.

Wherefore, Plaintiff prays judgment against defendants and each of them in the sum of \$6,150.00, for a reasonable attorneys' fee, for plaintiff's costs incurred herein, and for such other and further relief as to the court may seem proper.

LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for plaintiff.

State of California,
County of Los Angeles—ss.

....., being by me first duly sworn, deposes and says: that he is a member of the firm of Loeb and Loeb, a co-partnership, attorneys of record for Sears, Roebuck and Co., a corporation, plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true. Affiant further states that he makes this verification for and on behalf of said plaintiff corporation for the reason that no officer of said plaintiff corporation resides within the county in which affiant has his office.

HERMAN F. SELVIN

Subscribed and sworn to before me this 26th day of March, 1941.

(Seal) ELLOWENE EVANS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed 1941 Mar 26 PM 3 27 L. E. Lampton, County Clerk By C. H. Holdredge Deputy [5]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 462556

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff,

vs.

LILLIAN M. HOYT, and EZRA S. HOYT, JR.,
Defendants.

ANSWER

Come now the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr., and for answer to plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

For answer to paragraphs I, II, III and IV of plaintiff's First Cause of Action the defendants ad-

mit each and every allegation contained in said paragraphs.

II.

Answering paragraph V of plaintiff's First Cause of action defendants deny each and every allegation therein contained and specifically deny that the defendant Lillian M. Hoyt negligently operated, controlled and directed the Mercury motor vehicle which she was driving in such a manner as to cause the same to collide with the motor vehicle driven by plaintiff's employee.

III.

Answering paragraph VI defendants deny each and every allegation therein contained except that defendants admit that plaintiff's employee died on or about May 16th, 1940.

IV.

Answering paragraph VII defendants are informed and believe and therefore admit that plaintiff's employee left surviving a wife, Harriet E. Hutchinson, and a son, David Keith Hutchinson, and specifically deny each and all of the allegations contained in said paragraph except such as are herein expressly admitted. [6]

V.

Answering paragraph VIII defendants admit each of the allegations therein contained.

VI.

Answering paragraph IX defendants admit that by virtue of the award made by the Industrial Accident Commission on or about July 22nd, 1940, plaintiff is obligated to pay to the wife and sone of plaintiff's employee the sum of \$6150.00 as compensation for the death of said employee; further answering paragraph IX defendants deny that plaintiff has been damaged by reason of said award in the sum of \$6150.00, or in any sum whatsoever by reason of any negligence on the part of these answering defendants or either of them.

Answering plaintiff's Second Cause of Action defendants admit, deny and allege as follows:

I.

Defendants refer to paragraphs I to VI inclusive of their answer to plaintiff's First Cause of Action and by this reference incorporate the same herein as their answer to paragraphs I to IX of plaintiff's First Cause of Action and incorporated by reference in plaintiff's Second Cause of Action as though fully set forth herein.

II.

Answering paragraph II and III of plaintiff's Second Cause of Action defendants admit the allegations therein contained.

As a First Separate and Affirmative Defense to plaintiff's First and Second Cause of Action defendants allege:

I.

That the plaintiff's employee, Henderson S. Hutchinson, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of plaintiff's employee in the premises.

Wherefore defendants pray that plaintiff's complaint be dismissed; for their costs incurred herein; and for such other and further relief as to the court may seem proper.

D. A. BOONE and JAMES T.
SATCHELL and KENNETH
J. MURPHY

By JAMES T. SATCHELL

Attorneys for Defendants.

State of California,
County of Los Angeles—ss.

Ezra S. Hoyt, Jr., being by me first duly sworn, deposes and says: that he is one of the defendants in the above entitled action; that he has read the foregoing answer on behalf of himself and his co-defendant and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

EZRA S. HOYT, JR.

Subscribed and sworn to before me this 8th day of May, 1941.

(Seal) D. A. BOONE

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed LB Superior Court 1941 May 12 PM 4 22 L. E. Lampton, County Clerk By Clara M. Henkel Deputy [8]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 462556

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff and Cross-defendant,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants and Cross-complainants.

CROSS-COMPLAINT

Come now the defendants and cross-complainants and for several causes of action complain and allege as follows:

First Cause of Action of Lillian M. Hoyt.

I.

At all times herein mentioned United States Highway 101 also known as State Street, also

known as "O" Street, between its intersections with Santa Fe Avenue and Alameda Street in the County of Los Angeles, State of California, was and now is a public highway.

II.

At all times herein mentioned plaintiff and cross-defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, duly authorized to transact and now transacting business in the State of California.

III.

On or about May 13th, 1940, Henderson S. Hutchinson was and for some time prior thereto had been employed by plaintiff and cross-defendant as a salesman of merchandise sold by plaintiff and cross-defendant. As an incident of the employment aforesaid said employee was required to travel in and about the County of Los Angeles soliciting and obtaining orders for merchandise from plaintiff's and cross-defendant's customers. [9]

IV.

On said date said employee, while performing services growing out of and incidental to his employment with plaintiff and cross-defendant and while acting within the course and scope of his said employment, was driving and operating a motor vehicle, to wit: a Packard Sedan, in a westerly direction on said United States Highway 101 between

its intersections with Santa Fe Avenue and Alameda Street. At said time and place defendant and cross-complainant Lillian M. Hoyt was driving and operating a Mercury motor vehicle in an easterly direction along said U. S. Highway 101.

V.

That said time and place plaintiff's and cross-defendant's employee Henderson S. Hutchinson so negligently, carelessly, recklessly and unlawfully drove, operated and controlled said Packard Sedan that the same was caused to and did collide with and strike with great force and violence the Mercury Motor vehicle driven by defendant and cross-complainant Lillian M. Hoyt.

VI.

As a direct and proximate result of the negligence of the employee of plaintiff and cross-defendant, and as a direct and proximate result of said collision, said Lillian M. Hoyt was thrown with great force and violence against the side and other parts of said motor vehicle and the upper part of her body thrown with great force and violence through the door of said vehicle and against the paving and she thereby suffered, through said negligence, serious, severe and permanent injuries, as follows: A deep laceration across the frontal portion of the forehead just above the eyebrows, extending from over the left eye across the forehead to a point just over the right eye, said cut being

approximately four inches in length, the flesh above said laceration being pushed upwards exposing the skull. The blow being of such force and violence [10] to defendant's and cross-complainant's head as to cause the nose to be swollen and misshapen and to assume an unnatural angle for a long period of time, and to cause hemorrhages about her face and eyes and to render her unconscious for a period of time and in a dazed condition for several days thereafter; caused her to suffer a severe and extreme concussion and loss of memory; defendant and cross-complainant has, since being discharged from the hospital, been under the care of a physician and surgeon and has been required to undergo treatment in connection with said laceration, has been caused great physical and mental pain and suffering and is informed and believes that said treatments will continue in the future, the exact extent of which she is at this time unable to state; that defendant and cross-complainant is informed and believes that said laceration and tearing of the flesh across her forehead will result in a prominent unsightly and permanent scar and has caused her, and will in the future cause her, great and extreme embarrassment, humiliation and grievous mental suffering; that defendant and cross-complainant by reason of the negligence of the employee of plaintiff and cross-defendant sustained a shattered and broken tooth by reason thereof it has been necessary for her to undergo several dental opera-

tions for the removal of the broken portions of said tooth buried and embedded in the gum and jawbone, all of which has caused defendant and cross-complainant great pain, shock and suffering and she will be required to undergo further dental treatment in the future, the exact extent and nature of which she is at this time unable to state, said injuries to defendant's and cross-complainant's teeth being permanent; that as a direct and proximate result of the negligence of plaintiff's and cross-defendant's employee and the collision, and in addition to the injuries above-described defendant and cross-complainant suffered various and sundry bruises and abrasions about her limbs and body and great shock and permanent [11] injury to her nervous system and has been caused to endure great physical and mental pain and suffering. That by reason of all of said injuries herein described, directly and proximately caused by the negligence of plaintiff's and cross-defendant's employee defendant and cross-complainant has been damaged in the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars.

First Cause of Action of Ezra S. Hoyt, Jr.:

I.

At all times herein mentioned United States Highway 101, also known as State Street, also known as "O" Street, between its intersections with Santa Fe Avenue and Alameda Street in the Coun-

ty of Los Angeles, State of California, was and now is a public highway.

II.

At all times herein mentioned plaintiff and cross-defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, duly authorized to transact and now transacting business in the State of California.

III.

On or about May 13th, 1940, Henderson S. Hutchinson was and for some time prior thereto had been employed by plaintiff and cross-defendant as a salesman of merchandise sold by plaintiff and cross-defendant. As an incident of the employment aforesaid said employee was required to travel in and about the County of Los Angeles soliciting and obtaining orders for merchandise from plaintiff's and cross-defendant's customers.

IV.

On said date said employee, while performing services growing out of and incidental to his employment with plaintiff and cross-defendant and while acting within the course and scope of his said employment, was driving and operating a motor vehicle, to wit: [12] a Packard Sedan, in a westerly direction on said United States Highway 101 between its intersections with Santa Fe Avenue and Alameda Street. At said time and place defend-

ant and cross-complainant Lillian M. Hoyt was driving and operating a Mercury motor vehicle in an easterly direction along said U. S. Highway 101.

V.

That said time and place plaintiff's and cross-defendant's employee Henderson S. Hutchinson so negligently, carelessly, recklessly and unlawfully drove, operated and controlled said Packard Sedan that the same was caused to and did collide with and strike with great force and violence the Mercury motor vehicle driven by defendant and cross-complainant Lillian M. Hoyt.

VI.

That by reason of and as a direct and proximate result of the negligence of plaintiff's and cross-defendant's employee the Mercury motor vehicle of defendant and cross-complainant was wrecked and damaged and depreciated to such an extent that defendant and cross-complainant was damaged thereby in the sum of Six Hundred Fifty-four and 26/100 (\$654.26) Dollars.

VII.

That at all times herein mentioned and prior to said accident defendants and cross-complainants Lillian M. Hoyt and Ezra S. Hoyt, Jr., were and now are, husband and wife and cohabited and lived together at Rolling Hills, Los Angeles County, California.

VII.

That prior to said accident Lillian M. Hoyt, wife of defendant and cross-complainant Ezra S. Hoyt, Jr., was in good health and fully capable of performing and actually did perform all the household duties of a housewife in the care and management of defendant's and cross-complainant's three minor children; that [13] the said Lillian M. Hoyt has at all times been a pleasant and loving wife to defendant and cross-complainant and prior to said accident defendant and cross-complainant received much comfort and happiness in her society and companionship.

IX.

That by reason of the negligence of plaintiff's and cross-defendant's employee and collision as aforesaid, defendant's and cross-complainant's wife was thrown with great force and violence against the side and other parts of said motor vehicle in which she was riding and the upper part of her body thrown with great force and violence through the door of said vehicle and against the paving and through the negligence of said plaintiff's and cross-defendant's employee received a deep laceration across her forehead, various and sundry bruises and abrasions about her body and limbs and great shock to her nervous system and received a shattered and broken tooth, which said injuries defendant and cross-complainant is informed and believes are permanent and has been caused to endure great

pain and suffering on account of said negligence of said plaintiff's and cross-defendant's employee.

X.

That by reason of said injuries defendant's and cross-complainant's wife Lillian M. Hoyt has been unable to perform the duties which she theretofore had performed for defendant and cross-complainant; that as a result of said injuries said defendant and cross-complainant has been deprived of the services of his said wife, his comfort and happiness in her society and companionship have been greatly impaired and as defendant and cross-complainant is informed and believes and upon such information and belief alleges such fact to be that said deprivation will necessarily continue for a long time to come; that for several months after defendant's and cross-complainant's wife sustained said injuries she was unable to perform her household duties as a housewife and [14] it became necessary for defendant and cross-complainant to employ and he did employ someone to do this work in her place and stead; that by reason of said injuries defendant's and cross-complainant's wife has become highly nervous; that by reason of all of the aforesaid defendant and cross-complainant has been further damaged in the sum of Two Thousand Five Hundred and no/100 (\$2500.00) Dollars.

XI.

That by reason of the aforesaid injuries to defendant's and cross-complainant's wife defendant

and cross-complainant was obliged and did necessarily employ medical and dental aid and attention for his said wife and did necessarily pay and become liable therefor and for nursing and medicine, all in the total sum of Five Hundred Twenty-seven and 35/100 (\$527.35) Dollars; and did necessarily incur expenses in connection with hospital and ambulance service for which defendant and cross-complainant is liable in the sum of Two Hundred Thirty-nine and 79/100 (\$239.79) Dollars; defendant and cross-complainant is informed and believes and upon such information and belief alleges such fact to be that he will incur in addition to the expenses above-mentioned bills for plastic surgery in an attempt to effect a cure and alleviate the suffering of his said wife, in the further sum of approximately One Thousand and no/100 (\$1000.00) Dollars.

XII.

Defendant and cross-complainant is informed and believes and upon such information and belief alleges the fact to be that he will incur in addition to the expense above-mentioned bills for medical and dental expense in the future, the exact nature and extent of which the defendant and cross-complainant is at this time unable to state.

XIII.

That by reason of all of the injuries to defendant's and cross-complainant's wife and his property as above set forth [15] defendant and cross-complainant has been damaged in the aggregate

amount of Four Thousand Nine Hundred Twenty-one and 40/100 (\$4921.40) Dollars.

Wherefore defendants and cross-complainants pray judgment against the plaintiff and cross-defendant as follows:

(1) In favor of Lillian M. Hoyt in the sum of Twenty-five Thousand and no/100 (\$25,000.00) Dollars;

(2) In favor of Ezra S. Hoyt, Jr., in the sum of Four Thousand Nine Hundred Twenty-one and 40/100 (\$4921.40) Dollars;

(3) For costs of suit herein incurred; and

(4) For such other and further relief as to the court may seem proper in the premises.

D. A. BOONE and

JAMES T. SATCHELL and

KENNETH J. MURPHY

By JAMES T. SATCHELL

Attorneys for Defendants and

Cross-complainants

State of California,

County of Los Angeles—ss.

Ezra S. Hoyt, Jr., being by me first duly sworn, deposes and says: that he is one of the defendants and cross-complainants in the above entitled action; that he has read the foregoing cross-complaint on behalf of himself and his co-defendant and cross-complainant and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his

information or belief, and as to those matters that he believes it to be true.

EZRA S. HOYT, JR.

Subscribed and sworn to before me this 10th day of May, 1941.

(Seal)

D. A. BOONE

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed LB Superior Court 1941 May
12 PM 4 22 L. E. Lampton, County Clerk. By
Clara M. Henkel, Deputy. [16]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 462556

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff and Cross-Defendant,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants and Cross-Complainants.

PETITION FOR REMOVAL OF CAUSE TO
UNITED STATES DISTRICT COURT

To the Superior Court of the State of California,
in and for the County of Los Angeles:

The petition of Sears, Roebuck and Co., plain-
tiff and cross-defendant in the above entitled cause,
respectfully shows to this court:

I.

That this is an action now pending in the above named court in which Sears, Roebuck and Co., a corporation, is plaintiff and cross-defendant.

II.

That said action, originally on its complaint, was an action by Sears, Roebuck and Co., to recover a certain sum, to wit, \$6,150.00 from the defendants and cross-complainants, Lillian M. Hoyt and Ezra S. Hoyt, Jr., which sum was expended by Sears, Roebuck and Co., pursuant to an order of the Industrial Accident Commission of the State of California to the heirs of one Henderson S. Hutchinson, deceased, who was fatally injured while operating an automobile and when, according to the finding of the said Commission, he was acting as an employee of Sears, Roebuck and Co. That the said accident occurred on May 13, 1940.

III.

That subsequently the defendants in said action, Lillian M. Hoyt and Ezra S. Hoyt, filed a cross-complaint against your [18] petitioner seeking damages arising out of the aforesaid accident and alleged to have resulted from negligence on the part of your petitioner. That in said cross-complaint the cross-complainant Lillian M. Hoyt seeks damages in the sum of \$25,000.00 for personal injuries alleged to have been sustained by her and the cross-complainant Ezra S. Hoyt, Jr., seeks damages from

your petitioner in the sum of \$4921.40 for alleged medical expenses incurred on behalf of his wife, the other cross-complainant. That until the said cross-complaint was filed your petitioner was not a defendant in said action. That the said action and the said cross-complaint all arise out of the afore-said automobile accident.

IV.

Your petitioner shows that said action and said cross-complaint involves a controversy wholly between citizens of different states; that cross-complainants, and each of them, are now, were at the time of the commencement of this action, and were at the time of the filing of said cross-complaint citizens and residents of the State of California, and that your petitioner is now, was at the time of the commencement of this action, and at the time of the filing of said cross-complaint, and ever since has been a corporation duly created and organized by and under the laws of the State of New York, and was at all times referred to and is a citizen and a resident of said State of New York and was not, is not, and never has been a corporation chartered and organized under the laws of the State of California and was not, is not, and never has been a citizen or resident of said State of California.

V.

Said action is one of which the District Court of the United States is given original jurisdiction.

VI.

That the time within which your petitioner is required by the laws of this State and the rules of this court to plead to [19] the cross-complaint in the above entitled action has not yet expired. That the said cross-complaint herein was served on your petitioner on May 12, 1941.

VII.

Petitioner presents herewith a bond with good and sufficient surety, conditioned that your petitioner will enter in the District Court of the United States for the Southern District of California, Central Division, within thirty (30) days from the date of the filing of this petition, a certified copy of the record in this suit, and that your petitioner will pay all costs that may be awarded by the said United States District Court in case the said court shall hold that this suit was wrongfully or improperly removed thereto.

VIII.

That prior to the filing of this petition and of said bond for the removal of this case written notice of intention to file the same was given by petitioner to the cross-complainants as required by law, a true copy of which, with proof of service of the same is filed herewith.

Wherefore, your petitioner prays this Honorable Court to proceed no further herewith, except to make an order for the removal of this case to the said District Court of the United States, and to

accept the said petition, bond and surety thereon and cause the record herein to be removed into the said District Court of the United States for the Southern District of California, Central Division, at Los Angeles, California.

And your petitioner will ever pray.

SEARS, ROEBUCK AND CO.,

By LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for Plaintiff and
Cross-Defendant, Sears,
Roebuck and Co. [20]

State of California,
County of Los Angeles—ss.

Herman F. Selvin, being by me first duly sworn, deposes and says: that he is a member of the firm of Loeb and Loeb, attorneys of record for Sears, Roebuck and Co., a corporation, plaintiff and cross-defendant in the above entitled action; that he has read the foregoing petition for removal of cause to United States District Court and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true. Affiant further states that he makes this verification for the reason that no officer of plaintiff and cross-defendant corporation resides within the county in which affiant has his office.

HERMAN F. SELVIN

Subscribed and sworn to before me this 22nd day of May, 1941.

(Seal) ELLOWENE EVANS

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed 1941 May 22 PM 4 02. L. E.
Lampton, County Clerk. By M. Samuels, Deputy.
[21]

Maryland Casualty Company
Baltimore

In the Superior Court of the State of California
in and for the County of Los Angeles

Case No. 462556

SEARS, ROEBUCK AND CO., a Corporation,
Plaintiff,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Cross-complainants,

vs.

SEARS, ROEBUCK AND CO., a Corporation,
Cross-defendant.

BOND FOR REMOVAL

Know all men by these presents: That the Maryland Casualty Company, a corporation organized

and existing under the laws of the State of Maryland, having its principal office at Baltimore, Maryland, and duly authorized to transact a general surety business in the State of California, as Surety, is held and firmly bound unto Lillian M. Hoyt and Ezra S. Hoyt, Jr., Defendants and Cross-complainants in the above entitled action, in the penal sum of Five Hundred and no/100 Dollars (\$500.00), for the payment of which sum, well and truly to be made unto Defendants and Cross-complainants, the undersigned, Maryland Casualty Company, binds itself, its successors and assigns, jointly and severally firmly by these presents.

Signed, sealed and dated at Los Angeles, California, [22] this 22nd day of May, A. D. 1941.

Whereas, the Plaintiff and Cross-defendant in the above entitled action has petitioned or is about to petition the above named Superior Court of the State of California in and for the County of Los Angeles for the removal of the above entitled cause or action wherein pending, wherein Sears, Roebuck and Co., a corporation is the plaintiff and cross-defendant, and Lillian M. Hoyt and Ezra S. Hoyt, Jr., is defendants and Cross-complainants, to the United States District Court in and for the Southern District, Central Division of the State of California.

Now, the condition of this obligation is such, that if the plaintiff and cross-defendant shall enter into the United States District Court in and for the

Southern District, Central Division, of the State of California, within thirty (30) days from the date of filing their petition for removal of said action, a certified copy of the record in the above entitled suit or action, and shall pay all costs that may be awarded by said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise it shall remain in full force and effect.

(Seal)

MARYLAND CASUALTY
COMPANY

By RICHARD S. JOHNSTON,
Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this 22nd day of May, in the year one thousand nine hundred and forty-one before me Frances B. Gray, a Notary Public, in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Richard S. Johnston known to me to be the duly authorized Attorney-in-Fact of [23] Maryland Casualty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Corporation, and the said Richard S. Johnston acknowledged to me that he subscribed the name of the Maryland Casualty Company as Surety, and his own name as Attorney-in-Fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) FRANCES B. GRAY

Notary Public in and for said County and State.

My Commission expires January 6, 1942.

Approved May 29, 1941.

KURTZ KAUFFMAN

Court Commissioner of

Los Angeles County

Bond of

Maryland Casualty Company

Baltimore

Amount \$500.00

Dated May 22, 1941

[Endorsed]: Filed 1941 May 22 PM 4 02. L. E.
Lampton, County Clerk. By M. Samuels, Deputy.

[24]

In the Superior Court of the State of California
in and for the County of Los Angeles

May 29, 1941.

Present Hon. Frank G. Swain, Judge Presiding.

No. 462556

Department No. 35

SEARS, ROEBUCK AND COMPANY, etc.,
Plaintiff,

vs.

LILLIAN M. HOYT, et al,

Defendants.

Petition and bond of plaintiff and cross-defendant, Sears, Roebuck and Company, etc., for removal to United States District Court in and for the Southern District of California, Central Division come on for hearing, Loeb & Loeb by Vernon W. Hunt appearing as attorneys for plaintiff. Petition is granted and bond approved. [25]

No. 462556

State of California,
County of Los Angeles—ss.

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents and orders consisting of:

Complaint, Affidavits of Service by Mail, including copy of Letter (2), Answer, Cross-Complaint, Notice of hearing petition for removal, Petition for removal, Bond for removal, and Minute Order granting petition for removal to the District Court of the United States for the Southern District of California (Central Division) in the action of:

Sears, Roebuck and Co., a Corporation vs. Lillian M. Hoyt and Ezra S. Hoyt, Jr., to be full, true and correct copies of all of the original documents on file and/or of record in this office in said action to date.

In witness whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 19th day of June, 1941.

(Seal)

L. E. LAMPTON,

County Clerk and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By C. G. ALBRECHT,

Deputy.

[Endorsed]: Certified copy of record on removal.
No. 1602-Y Civil. Filed Jun. 19, 1941. [26]

In the District Court of the United States
for the Southern District of California

Central Division

No. 1602-Y Civil

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff and Cross-Defendant,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants and Cross-complainants.

ANSWER TO CROSS-COMPLAINT

Comes now the cross-defendant, Sears, Roebuck and Co., a corporation, and answering the cross-complaint herein admits, denies, and alleges as follows:

Answering the first cause of action of Lillian M. Hoyt:

I.

Admits the allegations of paragraphs I and II.

II.

Answering paragraph III, cross-defendant admits that Henderson S. Hutchinson was an employee of the cross-defendant at certain times on or about May 13, 1940, but cross-defendant denies generally and specifically each and every other allegation of said paragraph.

III.

Answering paragraph IV, cross-defendant admits that at the time and place referred to the cross-

complainant, Lillian M. [27] Hoyt, operated an automobile and that Henderson S. Hutchinson operated another automobile, but cross-defendant denies generally and specifically each and every other allegation of said paragraph.

IV.

Denies generally and specifically each and every allegation of paragraphs V and VI.

V.

Cross-defendant lacks information or belief sufficient to enable it to answer the allegations concerning cross-complainant's alleged injuries, damages, and losses, and basing its denial upon said lack of information and belief, and upon said ground alone, denies each and all thereof generally and specifically, and on said ground denies that cross-complainant was injured or damaged or sustained any loss as alleged, or at all.

VI.

Denies that cross-defendant was careless or negligent as alleged, or at all, and denies that Henderson S. Hutchinson was careless or negligent as alleged, or at all.

Answering the first cause of action of Ezra S. Hoyt, Jr.:'

I.

Admits the allegations of paragraphs I, II, and VII.

II.

Answering paragraph III, cross-defendant admits that Henderson S. Hutchinson was an employee of the cross-defendant at certain times on or about May 13, 1940, but cross-defendant denies generally and specifically each and every other allegation of said paragraph.

III.

Answering paragraph IV, cross-defendant admits that at the time and place referred to the cross-complainant, Lillian M. Hoyt, operated an automobile and that Henderson S. Hutchinson [28] operated another automobile, but cross-defendant denies generally and specifically each and every other allegation of said paragraph.

IV.

Denies generally and specifically each and every allegation of paragraphs V, VI, and IX.

V.

Cross-defendant lacks information or belief sufficient to enable it to answer the allegations of paragraphs VIII, X, XI, XII, and XIII, and the other allegations of said cause of action concerning cross-complainant's alleged injuries, damages, and losses, and concerning the alleged injuries, damages, and losses of the said cross-complainant's wife, Lillian M. Hoyt, and basing its denial upon said lack of information and belief, and upon said ground alone,

denies each and all thereof generally and specifically, and upon said ground alone denies that said cross-complainant was injured or damaged as alleged, or at all, and denies that cross-complainant's wife was injured or damaged as alleged, or at all.

VI.

Denies that this cross-defendant was careless or negligent as alleged, or at all, and denies that the said Henderson S. Hutchinson was careless or negligent as alleged, or at all.

Special Affirmative Defenses

I.

For a further, separate and affirmative defense to said cross-complaint and to each cause of action thereof, cross-defendant alleges:

That the accident referred to in cross-complainants' cross-complaint, and in each cause of action thereof, was caused and/or contributed to by negligence on the part of the cross-complainant, Lillian M. Hoyt, in that the said cross-complainant failed to exercise ordinary care in the control, management, and [29] operation of the automobile which she was driving. That at said time and place the said cross-complainant, Lillian M. Hoyt, was the wife of the cross-complainant, Ezra S. Hoyt, Jr.

Wherefore, cross-defendant prays that cross-complainants take nothing herein; that it be awarded judgment for its costs of suit herein incurred, and

that it be awarded judgment as prayed for in its complaint on file herein.

PARKER & STANBURY

By RAYMOND G. STANBURY

Attorneys for Plaintiff and
Cross-Defendant, Sears,
Roebuck and Co. [30]

(AFFIDAVIT OF SERVICE BY MAIL—

1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

Alma Dinwiddie, being first duly sworn, says:
That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 315 West 9th Street, Los Angeles, California; that on the 24th day of June, 1941, affiant served the within Answer to Cross-Complaint on the defendants and cross-complainants in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendants and cross-complainants at the office/residence address of said attorney, as follows: (Here quote from envelope name and address of addressee.) "Messrs. D. A. Boone and James T. Satchell and Kenneth J. Murphy, 300

Jergins Trust Building, Long Beach, California''; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

ALMA DINWIDDIE

Subscribed and sworn to before me this 24th day of June, 1941.

(Seal)

MARY O. TERPENNING

Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

Raymond G. Stanbury, being by me first duly sworn, deposes and says: that he is one of the attorneys for the plaintiff and cross-defendant, Sears, Roebuck and Co., a corporation, in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That the officers of said corporation are absent from the County of Los Angeles where their attorneys, of whom affiant is one, have their offices, and for that reason affiant makes this verification for and on behalf of said plaintiff and cross-defendant herein.

RAYMOND G. STANBURY

Subscribed and sworn to before me this 19th day of June, 1941.

(Seal)

MARY O. TERPENNING

Notary Public in and for the said County and State.

[Endorsed]: Filed Jun. 24, 1941. [31]

[Title of District Court and Cause.]

MINUTE ORDER

This cause coming on to be heard by the Court without a jury,—a jury having been expressly waived by the parties,—upon the issues raised by the Complaint and the Answer thereto, and the Defendants' Cross Complaint and the Plaintiff's Answer thereto, and evidence oral and documentary having been introduced, and the cause having been submitted to the Court for decision, and the Court having considered the evidence and the law and the arguments of counsel, now finds in favor of the Plaintiff and Cross Defendant and orders judgment in its favor in the sum of \$6150.00 and costs, and

that the Defendants and Cross Complainants take nothing by their Cross Complaint.

The Court is of the view that the accident which resulted in the death of the Plaintiff's employee, for which compensation was ordered paid by the Industrial Accident Commission of California, was solely the result of the negligence of Lillian M. Hoyt, and that this negligence was the sole and proximate cause of the injuries and consequent death of the Plaintiff's employee.

Findings and Judgment to be prepared by counsel for the Plaintiff under Local Rule 8.

Dated this 17th day of October, 1941.

[Endorsed]: Filed Oct. 17, 1941. [32]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing in the above court before the Hon. Leon R. Yankwich, Judge Presiding, on October 14, 1941, at the hour of 10:00 A.M., the plaintiff and cross-defendant, Sears, Roebuck and Co., a corporation, being represented by its counsel, Parker & Stanbury, by Raymond G. Stanbury, Esq., the defendants and cross-complainants, Lillian M. Hoyt and Ezra S. Hoyt, Jr., being present and represented by their counsel, Kenneth J. Murphy, Esq. and Daniel A. Boone, Esq., a jury

trial having been waived by all parties, evidence oral and documentary having been introduced, all parties having rested and the cause having been submitted to the Court for decision, the Court having considered the evidence, the law and the arguments of counsel and being fully informed in the premises herewith makes the following Findings of Fact and [33] Conclusions of Law:

FINDINGS OF FACT

I.

The Court finds that it is true that United States Highway No. 101 at the point at which the accident herein referred to occurred was at all times referred to a public highway in the County of Los Angeles, State of California.

II.

The Court finds that it is true that at and prior to the time of said accident and at all times since the plaintiff and cross-defendant, Sears, Roebuck and Co., a corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact and transacting business in the State of California; that it is true that more than two years prior to the commencement of this action the said plaintiff duly and legally secured from the Industrial Accident Commission of the State of California a certificate of consent to self insure; that at all times involved in this action said certificate was and now is unrevoked and plaintiff was

and now is self insured under and by virtue of the provisions of the Labor Code of the State of California.

III.

That the Court finds that it is true that, on May 13, 1940, Henderson S. Hutchinson was and prior thereto had been employed by plaintiff as a salesman of merchandise and that as an incident of his employment he was required to travel in and about the County of Los Angeles; that while performing such services and while acting within the course and scope of his said employment, Henderson S. Hutchinson was driving and operating a motor vehicle in a westerly direction on said United States Highway No. 101 between its intersections with Santa Fe Avenue and Alameda Street; that at said time [34] and place the defendant Lillian M. Hoyt was driving and operating a Mercury motor vehicle in an easterly direction along said United States Highway No. 101.

IV.

The Court finds that it is true that at the said time and place the defendant Lillian M. Hoyt negligently operated, controlled and directed the said Mercury automobile so as proximately to cause the same to swerve to her left-hand side of said highway and to collide with the automobile driven by the said Henderson S. Hutchinson inflicting upon the said Henderson S. Hutchinson personal in-

juries which proximately resulted in his death on or about May 16, 1940.

V.

The Court finds that it is true that at the time of his death the said Henderson S. Hutchinson left surviving him his wife, Harriet E. Hutchinson, and a son, David Keith Hutchinson.

VI.

The Court finds that it is true that on or about June 15, 1940 the said Harriet E. Hutchinson and the said David Keith Hutchinson as the wife and minor son, respectively, of the said employee, Henderson S. Hutchinson, filed their application with the Industrial Accident Commission of the State of California against plaintiff Sears, Roebuck and Co., a corporation, for adjustment of a claim for compensation by way of a death benefit; that on or about July 22, 1940, the said Commission duly rendered and made its award in favor of the said Harriet E. Hutchinson and the said David Keith Hutchinson and against plaintiff of a death benefit in a total sum of \$6,150.00; that said award became final prior to the commencement of this action.

VII.

The Court finds that it is true that by virtue of the said award of the Industrial Accident Commission plaintiff became obligated to pay to the aforesaid wife and son of the said Henderson S. [35] Hutchinson the sum of \$6,150.00 as compensation

for the death of said employee; that it is true that as a result thereof plaintiff was damaged in the sum of \$6,150.00; that it is true that plaintiff sustained said damage as a proximate result of the negligence of the defendant Lillian M. Hoyt.

VIII.

The Court finds that it is true that on May 13, 1940, the defendant Ezra S. Hoyt, Jr., was the owner of that certain Mercury automobile which was being driven by the defendant Lillian M. Hoyt at the time of the aforesaid accident.

IX.

The Court finds that it is true that at the time and place of the accident in question and at the time when the aforesaid fatal injuries were inflicted upon the said Henderson S. Hutchinson as a proximate result of the negligence of the defendant Lillian M. Hoyt the said defendant Lillian M. Hoyt was driving the said Mercury automobile with the permission and consent of the defendant Ezra S. Hoyt, Jr.; that the Court finds that the negligence of the defendant Lillian M. Hoyt is imputed to the defendant Ezra S. Hoyt, Jr., pursuant to the terms of Section 402 of the California Vehicle Code.

X.

The Court finds that as a proximate result of the negligence of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr., the plaintiff Sears, Roebuck

and Co. was damaged in the sum of \$6,150.00, although of that amount the defendant Ezra S. Hoyt, Jr., is liable for the sum of \$5,000.00 only.

XI.

The Court finds that it is not true that the plaintiff's employee, Henderson S. Hutchinson, did not exercise ordinary care or caution or prudence at the time and place of said accident or in an effort to avoid said accident and that it is not true that [36] the injuries sustained by the said Henderson S. Hutchinson or his death were directly or proximately caused or contributed to by any fault, carelessness or negligence on the part of the said Henderson S. Hutchinson; that it is not true that the said Henderson S. Hutchinson was careless or negligent in any respect; that the sole proximate cause of the accident and the death of the said Henderson S. Hutchinson was negligence on the part of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr.

XII.

On the cross-complaint the Court makes the foregoing findings, and each of them, in addition to those additional findings set forth hereinafter.

XIII.

The Court finds that it is not true that the employee of the plaintiff and cross-defendant, Henderson S. Hutchinson, drove, operated or controlled the automobile which he was driving, which was a

Packard sedan, negligently or carelessly or recklessly or unlawfully and that it is not true that the accident between the said Packard sedan and the automobile driven by the cross-complainant Lillian M. Hoyt was proximately caused or contributed to by any negligence on the part of the said Henderson S. Hutchinson.

XIV.

The Court finds that it is true that as a proximate result of the aforesaid collision between the vehicles referred to the cross-complainant Lillian M. Hoyt sustained certain personal injuries including a laceration upon her face, a concussion of the brain and other injuries, which caused her to be confined for a time to a hospital; but the Court finds that it is not true that the said injuries or losses or damages, or any thereof, were caused or contributed to by any negligence on the part of the cross-defendant or its employee, Henderson S. Hutchinson.

[37]

XV.

The Court finds that it is true that as a proximate result of the aforesaid accident the Mercury automobile driven by the cross-complainant Lillian M. Hoyt and owned by the cross-complainant Ezra S. Hoyt, Jr., was damaged; that it is true that the said Ezra S. Hoyt, Jr., was required to incur various expenses for the treatment of the aforesaid injuries to the cross-complainant Lillian M. Hoyt who was at all times the wife of the cross-complainant Ezra S. Hoyt, Jr.; that it is true that the said

cross-complainant Ezra S. Hoyt, Jr., was required to employ and did employ persons to perform certain of the household duties of his said wife; that it is true that the said Ezra S. Hoyt, Jr., sustained other losses and incurred other expenses in connection with the said accident including the employment of the physicians, hospital, ambulances, x-rays and dentists; that it is true that the said Ezra S. Hoyt, Jr., sustained losses thereby but the Court finds that it is not true that any of the said losses were proximately caused or contributed to by any negligence on the part of the cross-defendant or its employee, Henderson S. Hutchinson.

XVI.

The Court finds that all damage and loss of every kind and nature whatsoever sustained by the cross-complainants, or either of them, were proximately and solely caused by negligence on the part of the cross-complainants, and each of them, and that it is not true that the cross-complainants, or either of them, were damaged at all as a result of any negligence on the part of the cross-defendant or its employee, Henderson S. Hutchinson.

XVII.

The Court finds that it is true that the sole proximate cause of the aforesaid accident, of the death of Henderson S. Hutchinson, of the damage and loss sustained by the plaintiff and cross-defendant and by the cross-complainants, and each of them, was

negligence on the part of the defendants and cross-complainants, [38] and each of them, as herein found; that solely and as a proximate result of the said negligence of the defendants, and each of them, the plaintiff was damaged in the sum of \$6,150.00, of which sum the defendant Ezra S. Hoyt, Jr., is liable for the sum of \$5,000.00.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court concludes as a matter of law that the plaintiff Sears, Roebuck and Co., a corporation, is entitled to have and recover a judgment in the total sum of \$6,150.00 together with costs of suit as follows: Against the defendant Lillian M. Hoyt the sum of \$6,150.00 and costs of suit; against the defendant Ezra S. Hoyt, Jr., the sum of \$5,000.00 and costs of suit; that the cross-complainants Lillian M. Hoyt and Ezra S. Hoyt, Jr., and each of them, are not entitled to recover anything from the defendant Sears, Roebuck and Co., a corporation.

Dated: November 13th, 1941.

LEON R. YANKWICH

Judge

Approved as to form:

KENNETH J. MURPHY & DANIEL
A. BOONE

By

Attorneys for Defendants and Cross-
Complainants. [39]

Received copy of the within Findings of Fact and
Conclusions of Law the 6th day of November, 1941.

KENNETH J. MURPHY

By G. DESSERTY

Attorneys for Defendants &
Cross-Complainants

[Endorsed]: Filed Nov. 13, 1941. [40]

In the District Court of the United States, for the
Southern District of California, Central Di-
vision.

No. 1602-Y Civil

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff and Cross-defendant,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants and Cross-complainants.

JUDGMENT

This cause came on for hearing in the above court
before the Hon. Leon R. Yankwich, Judge Presid-
ing, on October 14, 1941, at the hour of 10:00 A.M.,
the plaintiff and cross-defendant, Sears, Roebuck
and Co., a corporation, being represented by its
counsel, Parker & Stanbury, by Raymond G. Stan-
bury, Esq., the defendants and cross-complainants,
Lillian M. Hoyt and Ezra S. Hoyt, Jr., being pres-
ent and represented by their counsel, Kenneth J.

Murphy, Esq., and Daniel A. Boone, Esq., a jury trial having been waived by all parties, evidence oral and documentary having been introduced, all parties having rested and the cause having been submitted to the Court for decision, the Court having considered the evidence, the law and the arguments of counsel and being fully informed in the premises and having made its Findings of Fact and Conclusions of Law: [41]

It is hereby ordered, adjudged, and decreed that the plaintiff, Sears, Roebuck and Co., a corporation, shall have and recover judgment in the total sum of \$6,150.00, together with costs of suit herein incurred, as follows:

Against the defendant Lillian M. Hoyt for the sum of \$6,150.00 and costs of suit, taxed in the sum of \$65.65.

Against the defendant Ezra S. Hoyt, Jr., for the sum of \$5,000.00 and costs of suit, taxed in the sum of \$65.65.

Payment of the sum of \$5,000.00 and costs of suit, by either of said defendants, shall operate as full satisfaction of this judgment as against the defendant Ezra S. Hoyt, Jr., and shall leave only the sum of \$1,150.00 to be paid on this judgment against Lillian M. Hoyt.

It is hereby further ordered, adjudged, and decreed that the cross-complainants, and each of them, have and recover nothing from the cross-defendant, Sears, Roebuck and Co., a corporation.

Dated: November 13th, 1941.

LEON R. YANKWICH

Judge

Approved as to form:

KENNETH J. MURPHY &

DANIEL A. BOONE

By

Attorneys for Defendants and
Cross-Complainants

Received the within Judgment this 6th day of
November, 1941.

KENNETH J. MURPHY

By G. DESSERY

Attorneys for Defendants and
Cross-Complainants. [42]

[Endorsed]: Filed Nov. 13, 1941. Judgment entered Nov. 13, 1941. Docketed Nov. 13, 1941. Book C. O. 7, Page 370. R. S. Zimmerman, Clerk, By Louis J. Somers, Deputy. [43]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To the Defendants and Cross-Complainants, Lillian M. Hoyt and Ezra S. Hoyt, Jr., and to Their Attorneys, D. A. Boone and James T. Satchell and Kenneth J. Murphy:

You, and each of you, will please take notice that the judgment in the above entitled action was en-

tered on the 13th day of November, 1941, in Civil Order Book No. 7, at page 370.

Dated: November 17, 1941.

PARKER & STANBURY

By TAYMOND G. STANBURY

Attorneys for Plaintiff and
Cross-defendant, Sears, Roebuck and Co., a corporation.

Received copy of the within Notice of Entry of Judgment this 18th day of November,

KENNETH J. MURPHY

G. DESSERY

Attorneys for Defendants and
Cross-complainants.

[Endorsed]: Filed Nov. 18, 1941. [44]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendants and cross-complainants Lillian M. Hoyt and Ezra S. Hoyt, Jr. hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain final judgment entered in the above entitled action on the 13th day of November, 1941.

Dated: December 11th, 1941.

KENNETH J. MURPHY

Attorney for defendants and
cross-complainants.

[Endorsed]: Filed and mailed copy to Attys. for Plf. Dec. 11, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy. [45]

[Title of District Court and Cause.]

STIPULATION RE DESIGNATION OF THE
RECORD, PROCEEDINGS AND EVIDENCE IN RECORD ON APPEAL (RULE
75)

It is hereby stipulated by and between Sears, Roebuck and Co. a corporation, Appellee, and Lillian M. Hoyt and Ezra S. Hoyt, Jr., Appellants in the above entitled action, by and through their respective attorneys of record undersigned, that the record on appeal in the above entitled action should consist of all of the pleadings, including the Complaint and Summons of the plaintiff and the Answer of the defendants, the Cross-complaint of the cross-complainants, and the Answer to the Cross-complaint, the Findings of Fact and Conclusions of Law, and the Judgment.

It is further stipulated that the complete Transcript of the stenographic notes of the official short-

hand reporter, Mr. H. A. Dewing shall be included in said record on appeal.

It is further stipulated that an original and a file [49] copy of said Transcript shall be filed herewith.

Dated: December 16th, 1941.

PARKER AND STANBURY

By RAYMOND G. STANBURY

Attorneys for Appellee

KENNETH J. MURPHY

Attorney for Appellants.

[Endorsed]: Filed Dec. 18, 1941. [50]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF THE PAPERS,
RECORDS, MATTERS AND EVIDENCE TO
BE USED ON THE RECORD ON APPEAL
(RULE 75)

Come now the defendants, cross-complainants and appellants, Lillian M. Hoyt and Ezra S. Hoyt, Jr. in the above entitled action, by and through their attorneys of record undersigned, and designate that the record on appeal in the above entitled action should consist of the following, and respectfully requests the Clerk to prepare the following papers:

(a) The complaint of the plaintiffs Sears, Roebuck and Co. a corporation filed in the Superior Court of the State of California, In and For the County of Los Angeles on March 26th, 1941.

(b) The answer of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr. to the complaint filed in the Superior Court of the State of California, In and For the County of Los Angeles on May 12th, 1941. [52]

(c) The cross-complaint on behalf of the defendants and cross-complainants Lillian M. Hoyt and Ezra S. Hoyt, Jr. filed in the Superior Court of the State of California, In and For the County of Los Angeles, on May 12th, 1941.

(d) The Petition of the plaintiffs Sears, Roebuck and Co. a corporation for Removal to the Federal Court filed in the Superior Court of the State of California, In and For the County of Los Angeles on May 22nd, 1941.

(e) The Bond on Removal to the Federal Court filed in the Superior Court of the State of California, In and For the County of Los Angeles, on May 22nd, 1941.

(f) The Minute Order filed in the Superior Court of the State of California, In and For the County of Los Angeles, on the removal to the Federal Court filed on May 29th, 1941.

(g) The answer to the cross-complaint of the cross-defendant Sears, Roebuck and Co. filed in the Federal Court on June 24th, 1941.

(h) A complete Reporter's Transcript of the stenographic notes of the Official shorthand reporter, H. A. Dewing.

(i) All exhibits including the map and photographs.

(j) The Minute Order for Judgment filed by

Hon. Leon R. Yankwich, District Judge on October 17th, 1941.

(k) The Findings of Fact and Conclusions of Law filed on November 13th, 1941.

(l) The Judgment signed by Hon. Leon R. Yankwich, District Judge, filed on November 13th, 1941.

(m) The Notice of Entry of Judgment filed on November 17th, 1941.

(n) The Notice of Appeal filed by Appellants Lillian M. Hoyt and Ezra S. Hoyt, Jr. on December 11th, 1941. [53]

(o) The Stipulation in re Designation of the Record, Proceedings and Evidence in Record on Appeal (Rule 75) filed on December 18th, 1941.

(p) The Amended Designation of the Papers, Records, Matters and Evidence to be used on the Record on Appeal (Rule 75) filed on January 26th, 1942.

Dated: January 26th, 1942.

KENNETH J. MURPHY &
DANIEL A. BOONE

By KENNETH J. MURPHY

Attorneys for Appellants.

Received a copy of the within Amended Designation, etc. on this 26th day of January, 1942.

PARKER AND STANBURY

By ALMA DINWIDDIE

Attorneys for Appellee

[Endorsed]: Filed Jan. 26, 1942. R. S. Zimmerman, Clerk. By _____, Deputy. [54]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to inclusive contain full, true and correct copies of: Complaint; Answer; Cross-Complaint; Petition of Plaintiff for Removal; Bond on Removal; Order of Removal; Certificate of Clerk on Removal; Answer of Plaintiff to Cross-Complaint; Order for Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Entry of Judgment; Notice of Appeal; Bond on Appeal; Stipulation Designating Record on Appeal; Amended Designation of Record on Appeal; and Order Extending Time to Docket Cause on Appeal, which together with the Exhibits and Reporter's Transcript of Testimony constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$15.35, which amount has been paid to me by the Appellants.

Witness my hand and the seal of the said District Court this 19th day of February, A. D. 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH

Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL

Appearances:

Messrs. Parker & Stanbury,

By R. G. Stanbury, Esq.

For plaintiff.

D. A. Boone, Esq.

and

Kenneth J. Murphy, Esq.

For defendants. [1*]

*Page number appearing at top of page of original Reporter's Transcript.

Los Angeles, California,

Tuesday, October 14, 1941. 10 A. M.

(Opening statements.)

W. W. HORST,

a witness called by and on behalf of the plaintiff,
being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Dr. W. W. Horst.

Mr. Murphy: I will be willing to stipulate to Dr. Horst's qualifications; that he is properly qualified as a physician and surgeon.

The Court: Give me a little idea. I don't think the Doctor has appeared before me.

The Witness: No, I never have.

The Court: I like to know these gentlemen that appear before me as experts, because we use them a great deal, and I like to have a general idea of their experience.

Direct Examination

Q. By Mr. Stanbury: Doctor, you are an M. D., are you not? A. Yes.

Q. Licensed to practice as a physician and surgeon in this State? A. Yes, sir. [2]

Q. Of what medical school or schools are you a graduate?

A. Washington University, Medical School.

Q. What year? A. 1913.

Q. Have you been practicing ever since?

A. Yes.

(Testimony of W. W. Horst.)

The Court: That is at——

A. St. Louis.

Q. By Mr. Stanbury: Have you been practicing ever since 1913? A. I have.

Q. Have you had any postgraduate courses, Doctor?

A. I have attended a lot of medical meetings and clinics. I was in France during the last war, with a base hospital there.

Q. At the present time your offices are in the City of Wilmington, are they not? A. Yes.

Q. You are in charge of the Wilmington Emergency Hospital? A. Yes, sir.

Q. As well as having private practice?

A. Yes, sir.

Q. How long have you been in charge of the Wilmington Emergency Hospital?

A. Since 1928. [3]

The Court: Who is associated with you?

A. Dr. Nerab.

The Court: He testified in a maritime case here some time ago.

Q. By Mr. Stanbury: Doctor, I take it that in the course of the last 13 years you have had occasion to see and examine many people at that Emergency Hospital, who have been involved in accidents, have you not? A. Yes, sir.

Q. Do you have with you at this time the record pertaining to Mrs. Lillian Hoyt?

A. I have.

(Testimony of W. W. Horst.)

Q. Will you produce that, please? And did you see Mrs. Hoyt at the Wilmington Emergency Hospital on May 13, 1940? A. Yes, sir.

Q. At what hour did you see her?

A. 4:45 p. m.

Q. She was brought into your hospital in an injured condition, I believe? A. Yes, sir.

Q. Did she make any coherent statement at all while there, on that day? A. No, sir.

Q. Did she utter any recognizable sound?

A. The only thing we could get out of her was "Margie", so we figured that her name was Margie.

[4]

Q. You got the woman's name "Margie" from her; that was the only recognizable sound she made?

A. Yes.

Q. Did you make any observation as to the condition of Mrs. Hoyt's breath at that time?

A. Yes, sir.

Q. What did you observe in that regard?

A. It was an alcoholic breath; it is so stated also on my records.

Q. To what extent did you observe alcohol on her breath?

A. That is hard to say, to what extent. It was there quite definitely.

Q. But you definitely noticed that odor?

A. Yes.

The Court: Was it not discernible so that you

(Testimony of W. W. Horst.)

could say that she had been consuming a certain beverage?

A. I haven't been able to do that.

Q. Is it possible?

A. Some may think so, but I have been fooled so often, I don't try.

Q. In other words a breath is just an alcoholic breath, whether it is beer, wine, whiskey or anything else?

A. That is right. One time I couldn't smell an alcoholic breath on two Japanese, and later one said they had too much sake.

Q. That was rather a foreign breath, wasn't it, Doctor?

Q. By Mr. Stanbury: What hour of the day was it that [5] you made these observations about Mrs. Hoyt, Doctor?

A. Between a quarter of 5 and 5 o'clock in the evening.

Mr. Stanbury: That is all.

Cross Examination

Q. By Mr. Murphy: Doctor, I will look at your card, if I may.

A. Yes. There are X-ray reports from the hospital.

Mr. Murphy: Mr. Stanbury, with your permission, and with the permission of the court, and in order to facilitate the Doctor's time, in addition to my cross examination, may I pursue other matters?

(Testimony of W. W. Horst.)

Mr. Stanbury: Yes.

Q. By Mr. Murphy: Doctor, will you please state what your physical findings were, in addition to this breath, when she came into your hospital?

A. This woman was brought in on a stretcher, and there was a laceration about 4 inches long, going through both brows and the upper eyelids, and across the bridge of the nose. The scalp of the forehead was laid back exposing a large part of the bone of the forehead.

Q. In your professional opinion, Doctor, would you say that she was unconscious?

A. Yes, sir.

Q. For what period of time did she remain unconscious?

A. I saw her over at the hospital about an hour and a [6] half later, and she was still unconscious, but the nurse got the name out of her of Hoyt. I couldn't understand her myself, but the nurse got the name of Hoyt.

Q. After that observation, an hour and a half later, Doctor, do you recall when you saw her again?

A. I saw her the next morning.

Q. What was her condition then relative to consciousness?

A. At that time I thought, although I found later that I was possibly mistaken—but she spoke quite rationally, and was conscious,—I thought she was clear the next morning. Dr. Nerab did not see

(Testimony of W. W. Horst.)

her until a few days later. He dropped in with me. She had never seen him before.

Q. Doctor, what tentative diagnosis did you make, following the accident?

A. She had a severe concussion of the brain; a possible fracture of the skull; severe laceration of the forehead; cut over the nose; and numerous bruises about her body.

Q. Any damage to the teeth?

A. She had one tooth knocked off; broken off.

Q. What did you do in the way of treatment the first few days?

A. After the preliminary treatment of suturing her wound, the treatment chiefly was keeping her quiet in bed, and letting nature do the work.

Q. She was hospitalized? A. Yes. [7]

Q. For what period of time?

A. She went home May 29th. 16 days, I guess. They kept her in the hospital the customary two weeks, on account of the severe concussion of the brain she had.

Q. X-rays were taken? A. Yes.

Q. I believe they were negative for fracture?

A. That's right.

Q. What was your preliminary diagnosis, after an X-ray study?

A. Severe concussion; severe laceration of the forehead; bruises about the chest and the ankle, and especially about the jaw. I thought for awhile that

(Testimony of W. W. Horst.)

she might have a fractured jaw, but the X-rays did not show it.

Q. You ruled out a fractured jaw?

A. Yes.

Q. After she went home did you continue to treat her?

A. No; I saw her once or twice after she went home. She was taken care of after that, by the family physician.

Q. During the time she was under your professional observation and treatment, how many times did you see her?

A. I saw her every day at the hospital; some days oftener. After she went home I didn't keep a record, but I saw her once or twice at home; I didn't keep a record of that.

Q. Did you render a bill for the services rendered by [8] you? A. I did.

Q. Do you recall the amount? A. \$150.

Q. Basing your answer upon your practice and knowledge of fees in the community, would you say that was a reasonable charge for the services which you rendered? A. Yes.

Q. Doctor, were you able, at the time you left the treatment of the case, to arrive at an opinion as to whether or not any of the injuries treated by you would be permanent in character?

A. Yes.

Q. Which ones were?

(Testimony of W. W. Horst.)

A. She will always have this scar, of course. That is the most prominent thing.

Q. Will you describe where that scar is?

A. That scar started right out here, about the edge of the eyebrow, and went across the upper lid, across here, and across the other side, the same way.

The Court: Did it affect or injure the eyes?

A. Very fortunately the eyes were not injured. She had a very black and blue eye on the right side. The eyeball itself was not injured.

Q. Did it cut through the eyelid?

A. Through the upper part of the eyelid; not the lower. [9]

Q. That was the reason that it did not cut the eyeball? A. Yes.

Q. By Mr. Murphy: Doctor, do you feel qualified to state whether or not any residual of the head condition, that is, if any, would be permanent?

A. I would rather not answer that.

Q. I suppose, Doctor, you have not followed through sufficiently on the case to testify to that, is that it? A. That's right.

Mr. Murphy: That is all.

Q. By the Court: Ordinarily concussions—talking in generalities—ordinarily concussions, unless they cover a large area of the brain, do not leave permanent injury?

A. Not ordinarily. Once in a while someone has after trouble.

(Testimony of W. W. Horst.)

The Court: If it is serious there will be some impediment, such as a nerve will be affected—there will be some impediment of speech or hearing, or something of the like?

A. The most usual experience in these people is headache and dizziness.

Q. By Mr. Murphy: How many sutures were required to close this wound?

A. I don't remember. I would say somewhere around 15 or 20.

Q. Can you give us some idea about the depth of the [10] wound?

A. Right down to the skull. You could feel the skull right under your fingers.

Q. What is the usual effect of a blow to the head, so far as memory is concerned of the event?

A. It blots out memory; just as I was going to mention about another case I had,—sometimes immediately before the accident and sometimes for some time preceding the accident, until they become conscious again.

The Court: There is no malingering; it is a genuine situation?

A. Yes; it is quite definite.

Q. By Mr. Murphy: Is it your professional opinion that Mrs. Hoyt suffered pain?

A. Yes.

Q. To what extent, while under your observation?

A. She is a high-strung, nervous individual. She

(Testimony of W. W. Horst.)

was quite nervous all that time, and had to be given a lot of sedatives to quiet her nerves. She had a lot of pain in that jaw, and in her sternum, or breastbone. She had a sore ankle.

Mr. Murphy: That is all.

Redirect Examination

Q. By Mr. Stanbury: You caused Mrs. Hoyt to be X-rayed, did you not? [11] A. Yes.

Q. The X-rays were negative for fracture anywhere, were they not? A. Yes.

Q. The first X-rays of the skull were somewhat ambiguous, and you ordered new ones?

A. Yes.

Q. The new ones showed no evidence of fracture? A. That's right.

Q. So, so far as you know, Mrs. Hoyt did not sustain any fracture of the nose, cheekbone, skull, or any other part of her body?

A. That's right.

Q. When you sent her over to the Seaside Hospital on the day of the accident, despite her unconsciousness, you wrote "Condition fairly good", did you not? A. That's right.

Q. By that you meant that you did not believe that she was suffering at that time from any critical condition?

A. Well, hardly. I meant her condition was good; she had a good pulse, and her general condition was good. I was not expecting her to pass out right away.

(Testimony of W. W. Horst.)

Q. Her pulse was still good at that time?

A. Yes.

Q. She left the hospital, do you know, on what day?

A. On the 28th. I mentioned awhile ago the 29th. It [12] was on the 28th.

Q. Are you the doctor who gave her permission to return to her home? A. Yes.

Q. So she was in the hospital a total of 15 days, including the fraction, wasn't she?

A. That's right.

The Court: I thought the Doctor said 16 days.

A. I made an error of one day, Judge.

Q. By Mr. Stanbury: Do you recall how long^r she remained in bed at home, if you know?

A. No, I do not. I saw her at home the next day after she left the hospital.

Mr. Stanbury: That is all.

Q. By Mr. Murphy: Doctor, basing your answer upon your professional experience, it is possible to have a very severe concussion result in permanent impairment, without a fracture of the skull, isn't that true? A. Yes.

Mr. Murphy: That is all. [13]

ROBERT C. DANIELSON,

a witness called by and on behalf of the plaintiff,
being first duly sworn, testified as follows:

The Clerk: What is your name?

A. Robert C. Danielson.

Direct Examination

Q. By Mr. Stanbury: Officer, you are a member of the Los Angeles Police Department, are you not?

A. I am.

Q. Stationed at what sub-station?

A. L. A. Traffic Division, San Pedro.

Q. Were you so connected with such station on the afternoon of May 13, 1940?

A. I was in the Traffic Division, only I was an investigator at that time.

Q. In the course of your duties on that afternoon did you go to the scene of an accident involving two vehicles which now may be identified as having been driven by Mrs. Lillian Hoyt, on the one hand, and Mr. Hutchinson, on the other? A. I did.

Q. What time did you get the call to go to that accident? A. 4:30 p. m.

Q. Did you go out there immediately? [14]

A. We did.

Q. When you got there did you find the vehicles? A. We did.

Q. What do you call the highway upon which these cars were located?

A. We call it 101 highway.

Q. Where were they located with reference to

(Testimony of Robert C. Danielson.)

any fixed object alongside the road? I want to fix their position as to the east and west direction of the highway.

A. The only fixed object we made on our report, it was alongside of the Texas Oil Company, approximately a half mile west of the Los Angeles City line.

Q. The road at that point runs which way?

A. East and west.

Q. On this map, on both sides of the road, we see the entries "The Texas Company" and "Wire fence enclosure" as clearly indicated here?

A. Yes.

Q. And that wire fence is the boundary of that Texas property?

A. There is a wire fence there.

Mr. Murphy: I object to the question upon the ground that it calls for the conclusion of the witness.

Mr. Stanbury: That is true. Is that what you refer to as the Texas property?

A. Yes, I would say that was. [15]

Q. Do you recall where these automobiles stood with reference to the wire fence around the Texas property?

A. Not exactly, but they were west of the east end of the fence.

Q. So they were opposite some part of the fence?
A. They were.

(Testimony of Robert C. Danielson.)

Q. Was there a curve immediately west of the place where these automobiles stood?

A. No, there isn't a curve west.

Q. Is there a curve east of where the cars stood?

A. There is a slight curve.

Q. Is the map accurate, according to your observations, as to the direction of the road?

A. It looks very exact to me.

Q. When you were at the scene of the accident, Mr. Danielson, did you take any photographs of the positions of the cars on the highway?

A. I did.

Q. And when you took those photographs, were the cars separated, or still together in some manner?

A. They were still together.

Q. After you had taken these photographs did you place them, and the negatives, in the police records?

A. I did.

Mr. Stanbury: I showed you these?

Mr. Murphy: Yes. [16]

Q. By Mr. Stanbury: I am showing you this. Can you recognize this large picture as an enlargement of one of the photographs you made of these automobiles at the scene of the accident?

A. It looks like the picture that I made, only enlarged.

Q. And the one I hold in my hand, is this the picture you took before the enlargement?

A. That's right. That looks like the picture of the police department, only it's enlarged.

(Testimony of Robert C. Danielson.)

Q. Is this the way these vehicles looked, relative to each other, and relative to the center line of the highway, at the time you arrived?

A. It does.

Mr. Stanbury: I would like to offer this as plaintiff's exhibit next in order.

The Court: That map should be identified, so long as you have used it already. We have a system here, where we have joint exhibits. Do you want it as a joint exhibit?

Mr. Murphy: I would be willing to stipulate to its being so used.

The Court: Very well, the map will be Joint Exhibit No. 1, and the photograph Plaintiff's Exhibit 1.

Q. By Mr. Stanbury: Mr. Danielson, were there any lines painted upon the paved portion of the highway at that time? A. There was. [17]

Q. How many?

A. There was a double line, and two single lane lines.

Q. Where was the double line?

A. The double line was in the center of the paved highway.

Q. That is, down the middle paved portion of the highway, is this double line? A. Yes.

Q. That was the only double line that was painted on the road? A. Yes.

Q. Calling your attention to this enlarged pho-

(Testimony of Robert C. Danielson.)

tograph, which is now Plaintiff's Exhibit No. 1, do you see that double center line? A. I do.

Q. Will you point it out, please? With permission of the court, I would like to put a large C over that, the large C to indicate the center line. Which way is that picture looking, officer?

A. The picture is looking east.

Q. That is, it would be——

A. The picture—this is east; from here to there is east.

Q. Which way is the picture facing?

A. I don't know just exactly what you mean by the picture facing. [18]

Q. Which way was the camera facing?

A. The camera was facing east; in a southeast direction.

The Court: I presume that the car to the right is the Mercury, is that right? A. Yes.

Q. The other car was the car Hutchinson drove?

A. Yes.

Q. What was that?

A. A 1935 Packard sedan.

Mr. Stanbury: May I write these words on that photograph, your Honor—Mercury and Packard?

The Court: That is all right. They are obvious, but you may write them.

Mr. Stanbury: I will put the word "Mercury" up here; and may I write the words on top "Facing east"?

(Testimony of Robert C. Danielson.)

The Court: You are going to show that photograph to others, and it reverses the calendar points, and there is always great confusion in these cases unless you settle the calendar points.

Q. By Mr. Stanbury: Did you notice upon the highway any tire marks which were in any way connected with the point where the Mercury rested on the pavement?

A. Yes, there was 48 feet of distinct skid marks starting from the right lane of traffic up to the point of impact.

The Court: Is Highway 101 at that place four lanes? [19] A. It is, yes.

Q. By Mr. Stanbury: Do you see any part of those tire marks, or any part of either of those tire marks, in the photograph?

A. This line that runs along here.

The Court: Indicating the extreme right corner of the photograph? A. Yes.

Mr. Stanbury: At the bottom, over where it begins, and in the margin of the picture, may I write "Tire marks"?

The Court: Certainly.

Q. By Mr. Stanbury: How many marks did you say there were, 48 feet long, Mr. Danielson? Was there a single mark, or more than one?

A. No, there was a double line, with both lines being double right before the impact.

Q. They started in which lane of traffic, at the furthest end from where the Mercury stood?

(Testimony of Robert C. Danielson.)

A. They started in the right lane of traffic.

Q. Which would be which by compass?

A. It would be the south lane of traffic.

Q. Will you step down to the map here, please, sir? Can you approximate the position on the highway relative to that Texas property, so as to give us a starting point, of where you found these automobiles?

A. I am not able to testify exactly. It was approximately [20] west of this corner. I remember the collision being in front of the wire fence. Just how far, I am unable to testify. I know it was approximately a half a mile from the——

Q. Give it approximately. Will you put an X to indicate approximately the east and west position of this wreck?

A. I would say approximately at this position.

Q. Making a rectangle, Mr. Danielson, and taking your time to get it as exactly as possible, will you draw in the position of the Mercury at the time of your arrival? A. The shape of a car?

Q. Yes, and take your time, if you will, please, to get the angle as accurate as possible.

A. I would say approximately that position.

Mr. Stanbury: I would like to mark that with a 1 with a circle around it, or rather, I will mark it with an M-1, for Mercury-1.

Q. Will you draw in as nearly as you can, the position of the Packard at the time of your arrival? Do you recall which way the Packard was headed

(Testimony of Robert C. Danielson.)

by the compass, at the time of your arrival, Mr. Danielson? A. Can I refer to my diagram?

Q. Yes.

The Court: Certainly, go ahead, Officer—anything that refreshes your recollection.

A. We have so many of these collisions, it is hard to [21] say. In a southwesterly direction.

Mr. Stanbury: May I look at that again?

A. I have got it all turned around.

Q. Which way, by the compass, before you erase that, was the Packard headed?

A. It was headed in a southeast direction.

Q. You have headed it southwest?

A. I have headed it southwest.

Q. Would you just correct that, please? By the way, the lanes are 10 feet wide, are they not?

A. The center lanes are 10 feet wide.

Q. These shoulders are paved?

A. The shoulders, of course, are paved shoulders.

Q. I want you to mark that with a P, for Packard-1. The Packard, I presume, was more than 10 feet long?

A. Yes, I think about 15 feet.

Q. So, in viewing that map, we have to make allowance for the fact that your scale shows the Packard less than 10 feet in length, do we not?

A. Yes.

Q. Will you draw in the 48 feet, skid marks from the Mercury, and you may measure that off with this scale? A. They go in a slight curve.

(Testimony of Robert C. Danielson.)

Q. Take your time, and draw them in, and measure the right distance afterward, if you will, Officer, please.

A. That was approximately the way I have it on my map [22] here.

Q. Mr. Danielson, I notice that you have shown on your diagram the road as 74 feet in width, exactly as it is on the surveyor's map, and you have the tire marks on your diagram starting in that area embraced between the edge of the pavement and the first line south of the center, and I wonder if you distinguished at the time you made the diagram between the paved shoulder and the pavement itself?

A. I realized the paved shoulder was there, but it is used for travel; it is traveled at all times.

Q. That is to say, that is not a shoulder that is only used for parking?

A. I wouldn't say it is a shoulder. It is paved all along here, except a small footage.

Mr. Stanbury: I wish to disclaim this map, so far as it shows that is a paved shoulder, because the photograph of the road will show there is nothing to distinguish.

The Court: The paved shoulder ceases to be a shoulder; it is merely an extension of the road.

A. The road has been widened there.

Mr. Stanbury: The map is in error on that. I have seen the place three times, in preparation for this lawsuit.

(Testimony of Robert C. Danielson.)

The Court: Let the testimony of the officer stand.

Q. By Mr. Stanbury: By the way, were these tracks in a film of dust, or were they apparently rubber marks?

A. Distinct rubber marks. [23]

Q. As if made by a vehicle upon which the brakes had been applied? A. Yes.

Mr. Stanbury: I will mark the west end of the marks just made by the officer off to one side, with the letters TM for tire marks.

Q. Will you take the stand again, please, Mr. Danielson? Did you notice what the damage was to the Mercury?

A. The whole front end was smashed in; the motor was knocked back; in fact, it was folded up pretty bad, the front end; it seemed like it just came together like an accordion.

Q. Did you notice what the damage was to the Packard?

A. The Packard was almost a total wreck. It started from the right front on back to the right rear.

Q. Along the right side?

A. Along the right side.

Q. Did you notice which way, in general, the metal parts on the right side of that Packard were pushed?

A. It was definitely hit from the right front fender, and pushed on back.

(Testimony of Robert C. Danielson.)

Mr. Murphy: I move to strike that it was definitely hit, as a conclusion of the witness. He can state the direction in which it was bent.

The Court: You can state the direction.

A. The vehicle seemed to have been struck from the right front toward the right rear. [24]

Q. By Mr. Stanbury: That is, the metal parts on the right side seemed to be bent backward?

A. Yes, sir.

Q. Was there any damage to the left side of that Packard, that you could see?

A. There wasn't.

Q. Do these photographs, Officer, correctly show the condition of that Packard at the time that you saw it on the road?

A. It looks very much the same as it was on the highway.

Q. Is any part of the front of the Packard damaged, that you can see?

A. No part of the extreme front; just back of the right front fender.

Q. It starts on the side of the right front fender? A. Yes.

Mr. Stanbury: I offer these as plaintiff's next in order, your honor.

The Clerk: Plaintiff's Exhibits 2 and 3.

Q. By Mr. Stanbury: You referred to having taken two pictures at the scene of the accident. Is this the other one, Mr. Danielson, that you took?

(Testimony of Robert C. Danielson.)

A. Yes, sir, that's one of the other ones. I took three photographs.

Q. What was the other one?

A. The other one didn't turn out. I checked with the [25] police department. Only two negatives came out clear.

Q. This was a close-up of the point of impact between the automobiles? A. Yes.

Mr. Stanbury: I offer that as plaintiff's next in order.

The Court: It may be received.

The Clerk: Exhibit No. 4.

Q. By Mr. Stanbury: At the time you arrived there, Officer, were either of the drivers still there?

A. No, they had just taken away both drivers in the ambulance.

Mr. Stanbury: Cross examine.

Cross Examination

Q. By Mr. Murphy: You do not know, Officer, whether either of these cars were moved at all in the process of moving Mr. Hutchinson or Mrs. Hoyt from that wreckage, do you?

A. No, I do not.

Q. In other words, this picture is a photograph taken by you of these cars after the ambulance crew had removed the persons? A. Yes, sir.

Q. How many people were around those cars when you arrived, that is, spectators?

(Testimony of Robert C. Danielson.)

A. I couldn't say. There was several; I imagine there [26] was 30 people or more.

Q. Officer, there is a curve in the highway at approximately the point of this accident, is there?

A. No; I think the curve is east of where the collision occurred.

Q. I realize, Officer, this has been a long time ago, this accident, and merely to refresh your recollection I will ask you: You remember testifying at the coroner's inquest in this matter?

A. Yes, sir.

Mr. Murphy: I am referring, if the court please, and Mr. Stanbury, to the coroner's transcript, page 3, line 19 down to 22. I will ask you to read it.

A. (Reading) "There is a slight curve there; where the accident happened, it is straight, but right before that on the east side of where the collision occurred, there is kind of a wide curve."

Q. "There is kind of a wide curve"—does that refresh your memory?

Mr. Stanbury: I object upon the ground that that is exactly the question asked.

The Court: That is not the question; if counsel wants to draw an inference of inconsistency——

Mr. Murphy: It is not that. I realize that curve is very wide, and inasmuch as the witness was not able to approximate it very closely, I thought if we could refer to [27] the transcript it might help the officer. It may not either.

(Testimony of Robert C. Danielson.)

A. So far as the curve is concerned, there is a curve there. We have had several collisions at that curve.

Q. Can you fix it this way: Referring to where the accident happened, was it before the curve commenced, or on the curve?

A. Where the collision occurred?

Q. Yes.

A. No, it was west of the curve. The road straightens out at that point.

Q. Approximately how far west of the curve?

A. I would say approximately 200 feet. That is not exact.

Q. I appreciate, Officer, that all you can give us is an approximation. I show you what purports to be a photograph looking in an easterly direction, showing the bridge, and ask you if that shows the approximate position of where this accident occurred.

A. It does. It seems like it was in this area, some place in here. Here is the fence.

Q. Yes; there is the wire fence to be seen from the left of the picture, that's right.

A. It was west of the fence. I remember the fence being on the east side—corner of the fence, on the east side of where the collision occurred.

Mr. Murphy: I would like to offer this picture, if the [28] Court please, for the purpose of showing a general view of the territory.

(Testimony of Robert C. Danielson.)

Mr. Stanbury: I don't have any objection if we also have one from the other, to show the perspective.

Mr. Murphy: Yes, I believe we have, Mr. Stanbury.

The Clerk: Defendants' Exhibit A.

Q. By Mr. Murphy: I show you what purports to show a view looking west, Officer. Mr. Stanbury and I have agreed under stipulation that we are not claiming any of these marks, other than this one near the center line.

Mr. Stanbury: For the sake of the record, it is stipulated that none of these marks on this photo, which I will identify for the record, as soon as I get the number, with the exception of the blood mark, which we will mark BM for blood mark, were caused by this accident.

Mr. Murphy: That is so stipulated.

Mr. Stanbury: But may be due to the tow car, or another car we know nothing about.

Mr. Murphy: Quite correct.

Q. Is that view looking west as of the point of accident? A. Yes.

Mr. Murphy: I offer that, subject to the stipulation of Mr. Stanbury.

The Clerk: Defendants' Exhibit B.

Q. By Mr. Murphy: While that is being marked, Officer, I will ask you if you did find a blood mark there. [29]

A. There was a blood mark there, yes.

(Testimony of Robert C. Danielson.)

Q. What was the approximate size of it, the area? A. Well——

Q. You may use the picture, if you wish, to refresh your memory.

A. It don't seem like there was quite that much blood, as what the picture shows, but there was a considerable lot of blood. I wouldn't want to state just how big the spot was.

The Court: Was it a smear?

A. No, it was definite blood.

Q. Was it still liquid, or had it become like a clot, or what?

A. Well, it was fresh. They had just moved Mrs. Hoyt from there, just as I arrived.

Q. By Mr. Murphy: From that point?

A. From that point.

Q. Was there a pool of blood there? Would you express it that way, or was the pavement merely stained?

A. There was quite a bit of blood there.

The Court: Of course, a pool is a large word.

Q. By Mr. Murphy: Officer, I show you one more picture, looking in an easterly direction, and ask you if that is a fair representation of the scene of the accident.

The Court: That has been marked B.

A. It is hard for me to determine. I am not able to see that fence. [30]

Q. By Mr. Murphy: Do you wish to compare Exhibit A with the picture you now have?

(Testimony of Robert C. Danielson.)

A. I would say the collision happened at approximately——

Q. Excuse me. I think you misunderstand; I am not having you fix the point of collision with this picture; merely is it a general view looking east-erly at approximately the point where the accident happened? A. It is a view looking east.

Mr. Murphy: That is all I want for the moment. I offer this at this time as defendants' next in order.

The Clerk: C.

The Court: It may be received.

Q. By Mr. Murphy: I show you, Officer, what purports to be a picture of the Mercury automobile involved in this case, and ask you if that picture is a fair representation of the car in its damaged condition, as you observed it after the accident.

A. I never saw the car after the collision, but that looks similar to what I would expect it to be.

Q. You would say that is a fair representation of it? A. Yes.

Mr. Murphy: I would like to offer this, if the court please, as the picture of the Mercury.

The Court: It may be received.

The Clerk: D.

Q. By Mr. Murphy: I show you another picture, which [31] purports to show a view of the front and left side of the Mercury, and ask you if that is a fair representation of the Mercury after the accident. A. It is, yes, sir.

(Testimony of Robert C. Danielson.)

Mr. Murphy: I would like to offer that as the exhibit next in order.

The Clerk: E.

Q. By Mr. Murphy: This picture, Officer, purports to be a picture showing a view of the front and right side of the Mercury after the accident. Is that a fair representation of the Mercury after the accident? A. It is.

Mr. Murphy: I offer this as defendants' next in order.

The Clerk: F.

Q. By Mr. Murphy: Officer, I show you what purports to be a picture of the blood spot which you previously mentioned, and certain marks—two pictures, one a close-up, and the other showing more territory, and I am going to ask you, Officer, if you are able to identify any of the marks, other than the blood mark, as being made by either car in this collision, and if so, which one.

A. I would say this spot here looks similar to that other spot in the picture.

Q. Are you referring to the blood spot?

A. I am referring to the blood spot.

Q. With regard to this lateral mark going from the [32] blood spot, are you able to identify that at all?

A. These marks here look similar to the brush marks left from the Packard.

Q. When you say "brush marks," what do you

(Testimony of Robert C. Danielson.)

mean, a straight ahead motion, or a side brushing of the wheels? A. Side brushing.

Q. I direct your attention, Officer, to the right rear wheel of the Packard in this picture, Plaintiff's Exhibit 1, and ask you if you found that tire in that condition, that is, flat, as shown on there?

A. I did.

Q. Did you notice at that time as to whether or not there were any brush marks swinging either straight or in an arc, either from the right rear or left rear wheels of the Packard?

A. There was. There was 15 feet of brush marks swinging from a northwest direction to the south.

Q. Were those brush marks made by the front wheels or rear wheels of the Packard?

A. Rear wheels.

Q. I direct your attention now to this picture, which has not yet been offered, which I will hold in my hand, and offer next, and directing your attention to the mark which I will designate——

Mr. Stanbury: You and I won't quarrel about that mark.

Mr. Murphy: ——as A. I will put an A in the center of [33] the mark that I am referring to, Officer, and ask whether or not that is the mark that you referred to as the brush mark, in your notes.

A. That looks similar to the brush mark. Whether that is the mark or not, I wouldn't want to say.

(Testimony of Robert C. Danielson.)

Q. Having in mind, Officer, that you did place this blood mark as being connected with the accident, does that help you fix it?

A. Yes, where the blood mark is—if that is the blood mark of the accident, the brush marks were in this direction from the blood mark. The picture is facing west.

Mr. Murphy: I would like to offer this picture at this time in evidence.

The Court: It may be received.

The Clerk: G.

Mr. Murphy: I believe that is all.

Redirect Examination

Q. By Mr. Stanbury: Mr. Danielson, the brush marks which you described as coming from the Packard were on which side of the center line?

A. They were on the north side.

Q. Were there any marks that you identify as coming from the Packard that were on the south side of the road? A. There was not.

Q. Did you see any signs of tire marks, or any other [34] marks, leading up to the Packard excepting these side brush marks?

A. No, there was no evidence at all of skid marks from the impact; just brush marks.

Q. That is to say, whatever marks may appear upon this variety of photographs, taken after the cars were removed, none of them are to be taken as indicating that the brakes on this Packard had been applied before the impact?

(Testimony of Robert C. Danielson.)

A. That is what I would say.

Q. You saw no such marks?

A. I saw no such marks. We looked for evidence to see which direction the car was coming from.

Q. Did you see any marks on the street, to the south of the center line, except part of that blood mark, and 48 feet of marks leading up to the Mercury? A. South of it?

Q. Yes.

A. When the front of the Mercury and Packard were together the whole street was full of debris and oil marks from the Mercury.

Q. That was where, with reference to the center?

A. That was covering across the center line, where both cars came together.

Q. That was a mass of debris, and accompanying scratches, I take it? A. Yes. [35]

Q. Other than that part of that circle or area of debris over the center line, and part of the blood mark, was there any mark to the south of the center of that highway, except the 48 feet of marks leading up to the Mercury, which you have already described? A. None that we could find.

Mr. Stanbury: I wish, your Honor, to read this sentence from the coroner's transcript, already read, showing that there is a straight away there: "There is a slight curve there; where the accident happened, it is straight, but right before

(Testimony of Robert C. Danielson.)

that on the east side of where the collision occurred, there is kind of a wide curve."

Q. Officer, in Exhibit 1, are you able to find for us the blood mark which we have found in the other pictures? All right, sir, I would like to mark that with a BM, for blood mark, if I may, your Honor.

Mr. Murphy: No objection.

Mr. Stanbury: Or I will mark it "Blood mark."

The Court: I assume that these faintly discernible white lines are the double lines in the highway—these two, is that correct? A. Yes.

Mr. Stanbury: I will just mark that "Blood mark." That blood mark was underneath or opposite the back part of the left front fender and the front part of the front door of the Mercury, is that right? [36]

A. Yes; the door had been opened, where the body was hanging out.

Mr. Stanbury: May I have a few of the other exhibits showing the same thing, Mr. Murphy?

Mr. Murphy: The blood mark?

Mr. Stanbury: Yes.

Q. With reference to Exhibit B, Mr. Danielson, you see the blood mark. That is the same blood mark that you referred to a while ago?

A. Yes.

Q. You saw only one circle of blood?

A. That's right.

(Testimony of Robert C. Danielson.)

Mr. Stanbury: May I mark on Exhibit B also the words "Blood mark," your Honor, to tie it in?

The Court: All right.

Q. By the Court: Officer, in this picture which is Exhibit A, which was evidently taken with the camera facing the turn of the road, so that the double line appears almost straight, the center, you did not indicate there the place at which the collision took place, did you? Where would you indicate it on that photograph?

A. It seemed like to have been right in this position.

Q. That is, the extreme lower end of the photograph? A. Yes.

Q. What was the distance between the place where the automobiles were found, and the beginning of the curve in [37] the road? You said it was on the straight part of the road? A. Yes.

Q. What was the distance, would you say?

A. From my memory only?

Q. Yes.

A. I would say it was about 200 feet; approximately that, it seems like.

Q. By Mr. Stanbury: Which way is the hill? Do you remember, Officer, which way the hill is, east or west, from the scene of the accident?

A. There is a slight grade; as you are driving west from Long Beach, as you come into the curve there is a slight grade.

(Testimony of Robert C. Danielson.)

Q. Is the grade east of the accident or west of the accident?

A. The grade is east of the accident.

Mr. Stanbury: I want to mark the words "Blood mark" also on Exhibit G, under the same mark. That is all, Officer.

Recross Examination

Q. By Mr. Murphy: Would you draw in the brush mark which you have testified to here, made by the Packard? Would you mark that P-1—that mark indicating the brush mark? Now, Officer, referring to the coroner's transcript again, page 7, lines 3 to 6, do you recall the question [38] being put to you by Mr. Boone, and you making this answer:

"Q— From your observation of the cars at the point of impact, was the Mercury on its own side of the road?

"A— It was; there was nothing to establish the Mercury being on the other side of the road." Did you so testify?

Mr. Stanbury: That is objected to as stating the conclusion of the witness, your Honor.

The Court: I will sustain the objection.

Q. By Mr. Stanbury: In looking at certain of these photographs they don't show much of the territory, so on this Exhibit G I am unable to tell which way it is looking. You have marked an A at the area where you say you believe you saw

(Testimony of Robert C. Danielson.)

the brush burns from the Packard. The brush burns from the Packard were which side of the center? A. They were north.

Q. They were north of the center, so if subsequently it should appear that this Packard is looking west, so that the side where you marked the A was actually the south side, the error is in your conclusion that this Packard was looking east rather than that side of the road where the brush burn was?

The Court: He is looking at that, it looks to me, upside down.

Q. By Mr. Stanbury: Which way did you assume that Packard was facing when you put the A on that? [39]

A. I assumed that it was facing east.

Q. Therefore you assumed that the A was on the north side of the road?

A. I assumed it was facing east. I see now that it was facing west.

Q. Did you see any brush burns from the Packard over where the A is?

A. Not from the Packard.

Q. When these pictures were taken all the cars had been towed away? A. Yes.

Mr. Stanbury: I think that point is clarified.

Q. By Mr. Murphy: Irrespective of any picture, you did find 15 feet of brush marks made by the Packard? A. Yes.

(Testimony of Robert C. Danielson.)

The Court: Can you tell from this picture, refreshing your recollection—this photograph which is Plaintiff's Exhibit No. 1, which shows to me about one-third the length of the Mercury across the double line—can you tell from this picture, and from your recollection of the position in which you found the cars, how far across the double line the Mercury was when you got there?

A. It was just like that. I imagine that would be about 3 or 4 feet. The front end of the car, of course, the right side of the Mercury, was right on the double line. It was the left that swung over, through the impact; that is [40] what it looked like. I couldn't figure that out myself.

Q. By Mr. Stanbury: So that the entire front of the Mercury, with the exception of the right-hand side of it, was to the north of the center line?

A. The entire front.

Q. Was the left side of the Mercury further north or further south than the right side of it?

A. The left side was further north.

Q. And the right side of the front of the Mercury was about on the center line?

A. Yes.

Mr. Stanbury: That is all.

(Short recess.)

Mr. Murphy: I would like to call Dr. Dickerson out of order.

The Court: Very well. [41]

DORREL G. DICKERSON

a witness called by and on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, please?

A. Dorrel G. Dickerson.

Direct Examination

Q. By Mr. Murphy: Doctor, you are a physician and surgeon?

A. Doctor of medicine.

Q. From what school were you graduated?

A. George Washington University, 1917.

Q. You have practiced your profession since that time? A. I have.

Q. Do you have a specialty? A. Yes, sir.

Q. What is it, sir?

A. Diagnosis and treatment of nervous disorders, injuries to the brain, and nervous diseases.

Q. Will you state to the court your experience in that line, and your qualifications in general, Doctor, in that specialty?

A. I had postgraduate work in the Neurological Institute, New York, in 1917; I served two years in the United States Army, Department of Nervous and Mental Diseases, in various hospitals. With the Walter Reed, four [42] years, with the United States Public Health Service, in the same capacity, diagnosis and treatment of brain disorders. Private practice in the City of Seattle, in 1925; specialized in neurology and surgery of the brain. At that time I was a consultant for the Ma-

(Testimony of Darrel G. Dickerson.)

rine Hospital, Public Health Service, Veterans' Administration, Police Department, and other hospitals. I came here in 1933, and have practiced my specialty since. I was licensed in California in 1929; and at the present time I am connected with the California Hospital, on the senior staff, and the Presbyterian Hollywood; St. Luke's, Pasadena. My office is at 1401 South Hope Street. I belong to the Medical Society of the State of California, L. A. County, American College of Surgeons, American Board of Neurology.

Q. Did you perform any service for the United States Unemployment Service? A. Yes.

Q. Doctor, I believe you had occasion to examine Mrs. Hoyt? A. I did, sir.

Q. When was that examination made?

A. It was made in May, 1941, at my office in Los Angeles.

Q. Who was present?

A. Mr. Hoyt, and the lady, and my nurse.

Q. What did your examination consist of?

A. History of the case; recording her complaints at that [43] time; a history of what happened, so far as she could tell me, and then a general physical examination.

Q. Doctor, in the interest of saving time, will you please tell the court what you did, your physical findings, your diagnosis and impressions of the patient?

(Testimony of Darrel G. Dickerson.)

A. Do you mean to give the positive things I observed, rather than all the detailed examination?

Q. Wherever it is important you may do that, but what we want in the main are your positive physical findings and your impression based upon the entire case.

A. The physical examination consisted of an examination of the head and cranial orifices, the heart, lungs, taking the blood pressure and pulse, and a general appraisal of her physical condition. I observed at that time a scar in the forehead running from above and incorporating the upper eyelid from right to left, across the bridge of the nose.

The neurological examination consisted of examining the pupils of the eyes, the movements interiorly of the eye, with an ophthalmoscope; an examination of the fifth cranial nerve, the trigeminal nerve, involved in this scar. The upper part of the forehead, into the scalp, both sides of the tissues, were extremely hypersensitive to the touch of cotton and the prick of a pin. It was my opinion that this was due to the injury to the ends of the nerve, as it came out of the little notches above the eye, called the supra-orbital nerve. Naturally, both sides were extremely [44] tender to touch and pressure; the sense of smell was normal; there was no impairment in the opening and closing of the eyes by reason of the scars. All of the reflexes were

(Testimony of Darrel G. Dickerson.)

hyperactive, but equal. There were no abnormal reflexes.

The Court: What was hyperactive or sensitive?

A. Hyperactivity or sensitiveness of the nervous system. There was no involvement of the power of the legs; the Romberg test was negative; there were tremors of the hands and eyes; but aside from that the examination was negative.

The Court: Was there any limitation of motion in any part of the body?

A. No, your Honor. The history was the important part of the examination. There was a history of injury with loss of memory preceding the accident and for some time thereafter, with no recollection on her part of what had happened at that time. When I was examining her, questioning her, she was on the verge of tears, suppressing tears at all times, so I did not press her for the details of the accident.

Q. Where did you say you examined her, at the hospital?

A. At my office, 1401 South Hope.

Q. She had been your patient?

A. She was no patient of mine. I merely examined her at the request of this gentleman, Mr. Murphy.

Q. By Mr. Murphy: Doctor, what is your impression as to any end results of this injury, if any?

(Testimony of Darrel G. Dickerson.)

A. I believe in time she will completely recover.

Q. Can you give the court an idea of that time?

A. In reference to this scar on the forehead, it may be, at the outside, three years before the peculiar sensation and the hypersensitive condition in the forehead disappears. I base that on the fact that these nerves require that long for complete rehabilitation, when we pull them out in operations.

Q. By the Court: She will not require any further operation to remove the skin blemish?

A. It is my opinion that she will not; that is only my opinion.

Q. You call that plastic surgery?

A. Plastic surgery, yes. The nervous symptoms may require anywhere from several months to a year or two. I don't think her memory will ever come back during that time; it is probably a good thing it doesn't. That is what we call amnesia.

Q. That is, for a few days after the accident?

A. Yes.

The Court: Otherwise her memory has not been affected? A. Not in my opinion.

Q. You have various tests which you can give?

A. From her attention to my questions and her reaction, and general appearance, I find no evidence of it.

Q. Don't you have a number of questions which you give? [46]

(Testimony of Darrel G. Dickerson.)

A. That is in testing for mental deficiency, psychology.

Q. In trauma you would not do that?

A. No.

Cross Examination

Q. By Mr. Stanbury: What was the date of the examination? A. May, 1941.

Q. Of this year? A. Yes.

Q. She told you about the accident a year before? A. Yes.

Q. You just saw her the one time?

A. Only once.

Mr. Murphy: What did you say about the scar, whether it would or would not be permanent?

A. The scar will be permanent.

Mr. Murphy: That is all.

Q. By Mr. Stanbury: What color was it when you saw it? A. Pale.

Q. The redness had gone out of it?

A. It had practically disappeared.

The Court: That takes time to blanch?

A. To blanch; the shrinking of the scar.

Q. You can't apply massage?

A. Yes, but in a disfiguring scar, after all, nature [47] ultimately——

Q. Nature ultimately has to do it?

A. But the doctor takes credit for it. If it wasn't for nature we would all have to quit.

(Recess until 2 o'clock p. m. of the same day.) [48]

Afternoon Session

2:00 o'Clock

Mr. Stanbury: I wish to read into the record the testimony of the witness Lenton W. Finton, as given at the coroner's inquest following the accident in question, read by stipulation, the witness being absent on a destroyer at sea at the present time, a seaman in the United States Navy.

"LENTON W. FINTON

being duly sworn, testified as follows:

By the Coroner:

Q. State your name, please.

A. Lenton W. Finton.

Q. Occupation?

A. Storekeeper, Naval Air Station, San Pedro.

Q. State what you saw in reference to the accident, please.

A. Well, at that particular time we were going toward Long Beach, and I noticed this Mercury ahead of us between one hundred and one hundred and fifty feet, somewhere around there, and what particularly drew my attention to it, I had no more than seen the back of it, and it swerved traveling along the first lane, right along the white line, and suddenly swerved to the center lane, and my eye followed the Mercury [49] across there, and I spotted the Packard just as she hit him, and

(Testimony of Lenton W. Finton.)

as near as I could tell, it all hit approximately where they sat.

Q. Did you notice what caused the Mercury to make that sudden swerve?

A. No, sir, I didn't.

Q. When you first saw the Mercury, was it in the lane to your—the most southerly lane of traffic, was it then to your right?

A. When I first saw the Mercury, it was almost dead ahead of us.

Q. Where were you at the time?

A. We were on the outside lane.

Q. What do you mean by 'outside lane'?

A. The lane next to the shoulder.

Q. On the south side?

A. On the south side.

Q. And did it suddenly swerve over to the center of the street?

A. Yes, sir.

Q. Did you see any motor vehicle or obstruction or anything ahead that would cause the driver of the Mercury to make a sudden swerve over to the center of the street?

A. No, sir, I didn't.

Q. In what manner did the two motor vehicles collide?

A. Well, it appeared that the right front end of the [50] Packard, and when they were stopped they were setting on the double white line, the Mercury was setting in catercorner, and the Packard was setting more broadside

(Testimony of Lenton W. Finton.)

to the road (indicating), and the woman when it threw her from the car, it mangled her feet up in the clutch and the brake, and her head was approximately on the double white line, hanging head down, and those cars, neither one did very much swerving, they bounced up and down, and there was a little dust blew and that is about all.

Q. It was the right side of the Mercury that struck the right side of the Packard, is that correct? A. That is correct.

Q. Then which car was on the wrong side of the highway, that is on the wrong side of the center line?

A. The Packard; when they got stopped, the Mercury was setting on that white line, or practically over it, but as near as I could tell from watching, she did not go across that double white line.

Q. Did you see the Packard before the impact?

A. No, sir, the first I seen it was when she hit him.

The Coroner: Any questions?

Q. By a Juror: What speed would you say the Mercury was going?

A. Between forty and forty-five.

Q. By Mr. Danielson: Did you ever see the Packard on the other side of the double line? [51]

(Testimony of Lenton W. Finton.)

A. That is hard to tell, she hit him so quick, I would say that he wasn't but I know I saw her car before I saw his, and she did not go across the double white line.

Q. It is just an opinion that he went the other side of the white line?

A. It is mainly an opinion, yes.

Q. By a Juror: Did you see any skid marks from the Packard? A. No.

Q. By Mr. Boone: At the instant you saw the Packard could you tell what direction the Packard was headed at that time?

A. It occurs to me he was headed off in this direction (indicating).

Q. That is the impression at the time that the Packard was headed across the highway to the southwest?

A. He was like this (indicating), at the moment I saw that Packard, his front end was hitting her front end like that (indicating).

Q. You are indicating that the Packard—how would that be to the highway, would it be at an angle?

A. It was about like that (indicating).

Q. And at the time of the impact, the Mercury was definitely south of the center white line? A. Yes, sir.

Q. By Mr. Hunt: You didn't see the Packard until the moment of the impact? [52]

A. No, sir, I did not.

(Testimony of Lenton W. Finton.)

Q. And don't know what direction it was headed prior to that? A. No, sir.

Q. And you followed the Mercury out there?

A. No, sir, I stayed on the outside lane.

Q. You didn't run into any parked car on the highway, did you?

A. No, sir, we did not.

Q. And didn't find any parked car there?

A. No, sir.

Q. There was no obstruction on the highway at all?

A. I seen no parked cars.

Q. You were traveling on your side of the highway? A. Yes, sir.

Q. And didn't run into any?

A. No, sir.

Q. Where did you bring your car to a stop?

A. Approximately right across from the wreck.

Q. By a Juror: Were you driving?

A. No, sir, Mr. Hoffman was driving.

Q. What speed were you traveling?

A. Right around forty, maybe a little over or a little less.

Q. And there was no noise of any brakes or tires burning?

A. No, sir, none that I noticed or heard.

[53]

Q. By Mr. Boone: Who was driving your car?

A. Mr. Hoffman was driving it.

(Testimony of Lenton W. Finton.)

Q. And where were you sitting with reference to the car, with reference to Mr. Hoffman?

A. I was sitting in the right front seat; I was sitting kind of sideways talking to Mr. Hoffman is the reason I could follow the Mercury with my eyes as well as I did.

Q. You say you did not see any car ahead of the Mercury?

A. No, sir, I did not.

Q. Do I understand you to say there was no car there, or you didn't notice?

A. No, sir, I didn't say there wasn't any, I said I didn't notice any.

Q. You don't know whether there was or wasn't? A. No, sir.

Q. Did you see any car close to the Packard?

A. No, sir.

Q. At the time the two cars came together?

A. No, sir.

Q. Did you see any cars parked over on the north side of the highway opposite the point where they came together as you got out of the car?

A. No, sir. At the time I got out of the car, I was looking across at the wreck.

Q. In other words, you knew somebody was hurt, and you were out there and wasn't paying any attention to any [54] physical facts around the accident?

A. Yes, sir, I seen her head hanging out of the car.

The Coroner: Any other questions? (No response). That is all."

Mr. Stanbury: I wish to read the testimony of Francis H. Hoffman, taken at the coroner's inquest, also read by stipulation.

"FRANCIS H. HOFFMAN,

being first duly sworn, testified as follows:

By the Coroner:

Q. State your name, please.

A. Francis H. Hoffman.

Q. Your occupation?

A. Storekeeper in the Navy.

Q. Where are you attached, attached to a vessel?

A. Naval Air Station, San Pedro.

Q. Where were you at the time the accident occurred, please?

A. We were on our way to Long Beach, and I would say we were about one hundred to one hundred and fifty feet behind the Mercury.

Q. State what you saw in reference to the accident, please.

A. I didn't actually see the impact, I noticed the Mercury going ahead of us, and what drew my attention to the [55] accident was the crash, and I seen they were bouncing around in the highway.

Q. Could you tell where the impact occurred in reference to the center line of the highway?

A. I would say it was just about right where they were at, right on the center line.

(Testimony of Francis H. Hoffman.)

Q. Well, did you see the Mercury before the impact?

A. I noticed it on the highway, just a few seconds before it hit.

Q. Where was it in reference to the center line, was it out near the center?

A. It was out ahead of us; we were on the outboard lane of traffic, and the left front wheels were on the middle white line, not the center of the highway but the other white line.

Q. Had you noticed the Mercury swerve in either direction prior to the impact?

A. No, I hadn't.

Q. Did you form any opinion as to the speed of the Mercury?

A. We were doing about forty, and it was doing at least that, what we were.

The Coroner: Any other questions?

Q. By Mr. Coleman: Was she driving away from you, or approximately the same speed?

A. Well, it all happened so quick, I wouldn't know [56] whether it was the same speed or what.

Q. By a Juror: Did she turn out to pass you? A. No, she was ahead of us.

Q. By Mr. Boone: How far had you followed her?

A. I don't know how far we had followed her, the first thing I noticed was the auto and then the noise of the crash.

(Testimony of Francis H. Hoffman.)

Q. Where did you turn on State Street?

A. The first stop street back there, I think it is Alameda.

Q. Right there by the Texaco plant?

A. Yes.

Q. And the Mercury was just ahead of you when you turned in there?

A. I didn't notice before that.

Q. Not until after you turned on 101, is that correct? A. Yes.

Q. How many cars did you see on the highway at the time?

A. There wasn't very many cars.

Q. Did you notice a car ahead of the Mercury? A. No, I didn't.

Q. When you say you didn't, would you say there wasn't one there, or didn't notice one there?

A. There was a Ford afterwards standing over from the wreck there.

Q. On which side?

A. Right on the side where we were, I didn't notice [57] whether it was there before the wreck or after.

Q. Did you notice a car parked on the north side of the road immediately following the wreck? A. No, sir, I didn't.

Q. Did you see a car ahead of the Packard at any time? A. No, I didn't.

Q. You were not paying any attention to what the physical situation was at that time?

(Testimony of Francis H. Hoffman.)

A. Well, I was watching my driving, and didn't notice the car.

Q. By Mr. Hunt: You didn't see the Packard before the accident? A. No, sir.

Q. The only car you saw at all was the Mercury?

A. I happened to notice it, and the next I seen of it was the crash.

Q. The Mercury was the only car that you noticed, wasn't it?

A. At the time, yes.

Q. By Mr. Chappel: What lane were you traveling in? A. The outboard lane.

Q. And the Mercury also?

A. Yes, sir.

Q. By Mr. Hunt: By 'outboard', do you mean the first lane on the highway?

A. The one next to the shoulder. [58]

Q. Was there anything there that would cause the Mercury to swerve out to the center of the street?

A. Well, there was a Ford standing opposite there, but I didn't notice whether it was there or whether they stopped after the accident or before; it was setting right across from the wreck.

Q. What part of the highway did it occupy?

A. It was over on the shoulder.

The Coroner: That is all."

Mr. Stanbury: That is the end of that examina-

tion. Now, in regard to the pleadings in this case as constituting an admission that the plaintiff in this case has been damaged in the sum of \$6,150 as a result of this accident?

Mr. Murphy: We raise no issue on that amount.
(Discussion.)

Mr. Murphy: In any event we stipulate that that money was paid.

The Court: As a result of the injury or death flowing from this accident?

Mr. Murphy: Yes, that is so stipulated.

Mr. Stanbury: I have been given leave by the defendant to cross examine the defendant when she comes here, as a part of this case.

Mr. Murphy: She will be here.

Mr. Stanbury: With that reservation the plaintiff rests.

The Court: Under the new Rules of Federal Procedure we [59] have a section corresponding to Section 2055 of the Civil Code.

Mr. Stanbury: I was going to call Mrs. Hoyt. She will be here in a few minutes, and I am going to rest on that, counsel.

Mr. Murphy: On behalf of the defendants I would like to read into the record the testimony of Mrs. Hastings, an absent witness, now in New York, the testimony being from the transcript of the coroner's inquest.

The Court: Is that a sister?

Mr. Murphy: No, your Honor, a witness to the accident, who is now in New York.

“FLORENCE HASTINGS,

being first duly sworn, testified as follows:

By the Coroner:

Q. State your name, please.

A. Florence Hastings.

Q. Your residence? A. 2635 Daisy.

Q. Long Beach? A. Yes, sir.

Q. Housewife? A. Yes, sir.

Q. Where were you at the time this accident occurred, please? [60]

A. I was about two tenths of a mile behind the Packard.

Q. Which direction were you traveling?

A. I was traveling west.

Q. State what you saw in reference to the accident.

A. Well, I made the boulevard stop, that is, there is a signal at Santa Fe and State, and I made the stop on Santa Fe, to turn onto State Street, and when I made my stop, the Packard went through the signal, the signal was go going on State, and, of course, I then turned behind him and went right on, I was going to the Texaco Oil Company.

Q. All right, state what you saw in reference to the accident.

A. Well, as I was back about two tenths of a mile, right where the tracks cross State, the Packard went to pass another car, and he was over close to the double line in the street, and

(Testimony of Florence Hastings.)

there is a curve, and as he went around the curve, the Mercury was coming from the opposite direction, and they went together, and I never stopped, I went on. I went behind the Packard and on to the refinery.

Q. Could you tell where the impact occurred in reference to the center line of the highway?

A. Well, the way it looked to me, he was on the wrong side of the street.

Q. Could you tell how far over the center line of the street he was?

A. Well, it looked like he was astraddle of the two [61] lines, the center.

Q. Do you know what caused the Mercury to come from the south side over to the center of the street?

A. No, I don't. The Mercury, it happened, of course, so suddenly, I was driving along and the next thing they were together.

Q. Could you tell in what manner they struck, that is, what part of the Mercury struck the Packard, or what part of the Packard struck the Mercury?

A. The front.

Q. How fast was the Packard traveling?

A. Well, I would say forty-five or fifty miles an hour.

Q. And could you form any opinion as to the speed of the Mercury?

A. No, I could not.

Q. Well, the officer testified that there was

(Testimony of Florence Hastings.)

forty-eight feet of skid marks made by the Mercury coming from the south part of the street over to the center. Do you know how far the Mercury pursued that course?

A. No, I don't.

Q. Was either party thrown out of their cars? A. Yes, the lady.

Q. Was the traffic light or heavy at the time?

A. It was very light at the time.

Q. Was the Mercury passing another car at the time, do you know? [62]

A. Not that I could see.

Q. Well, the car that the Packard was passing, what part of the highway did that car occupy?

A. Well, he was, I guess you would say in the second lane.

Q. Next to the center line?

A. No, next to the shoulder.

Q. Well, was it necessary for the Packard to straddle the center line in order to pass that car? A. No, I would not think so.

The Coroner: All right, any questions? (No response). That is all."

Mr. Murphy: However, this witness was later recalled:

“FLORENCE HASTINGS,

being recalled, testified as follows:

By the Coroner:

Q. When you saw this accident, did you realize that it was a pretty bad wreck?

A. Yes, sir.

Q. How did it happen you didn't stop?

A. Well, I saw the lady—when I saw the two sailors getting out of their car and going to the wreck and there were other cars stopping and I was on my way after my husband, and he is always irritable if I am late, and so I went on.

Q. And who did you tell that you had witnessed an [63] accident?

A. My husband.

Q. Did you tell the police?

A. No; there was no police there at the time.

Q. Well, do you know how it happened that the first the police learned that you had seen the accident was through Mr. Hoyt?

A. Well, no, I would not say it was, because I think my husband—they called from the Texaco for the ambulance, and I think there is where they found out that I saw it.

Q. Are you acquainted with Mr. Hoyt?

A. No, sir.

Q. By Mr. Hunt: Did you stop at all at the scene of the accident?

(Testimony of Florence Hastings.)

A. I went just as slow as I could go without stopping, because I had to get around behind the Packard, and I saw other cars were stopped, and I didn't stop, and the lady, as we came back, they were putting a blanket or something under the lady's head.

Q. Did you get out of the car and come back?

A. No, I picked him up at the refinery, and we turned around and came right back.

Q. Did you stop then?

A. No, we didn't stop, there were several cars stopped and they seemed to be doing all right, and I didn't stop.

Q. You didn't take note of the physical facts such as [64] marks on the pavement at any time?

A. Yes, I drive over there every day, and the marks were there for several days, of oil and grease.

Q. You saw some marks on the other side of the double center line? A. Yes.

Q. By Mr. Boone: Did you see oil marks north of the center line the following day?

A. Yes.

Q. And didn't you notice considerable marks on the pavement where the ambulance and cars had driven through that oil? A. Yes.

Q. Those were the marks you saw north of the center line? A. Yes.

(Testimony of Florence Hastings.)

Q. And when you were driving back, I think you stated you saw a car as you started to pass the Packard? A. Yes.

Q. Did you see that car?

A. Well, it was parked along the curb.

Q. On which side of the highway?

A. On the right headed west.

Q. About how far from where the two cars were standing?

A. Well, it was almost even with the cars, a little bit of forward, I would say. [65]

Q. Did you see anybody getting out of that car, see a man getting out of that car?

A. Yes, there was a man that was rushing down toward the gate at the refinery; later, I heard he was the one that was going to make a telephone call.

Q. And did you see those two boys that testified here?

A. Yes, I saw them; they were on the opposite side.

Q. By a Juror: Was this car that was parked on the highway on the shoulder?

A. It was on the shoulder.

Q. By Mr. Hunt: And was west or east of the point of impact?

A. I would say it was west.

Q. Beyond where the point of impact occurred? A. Yes, just a little.

Q. And which way was it headed?

(Testimony of Florence Hastings.)

A. It was headed west.

Q. Headed away from the accident?

A. Yes.

Q. And no part was on the highway?

A. No, it was clear at the curb.

Q. Did you see any car on the dirt highway, at the side of the highway?

A. Yes, these boys were stopping and another car.

Q. What boys?

A. Well, these sailors. [66]

Q. After the accident, you mean?

A. Yes.

Q. By Mr. Boone: May I ask you about knowing Mr. or Mrs. Hoyt, did you ever see or hear of them until you came here and saw Mr. Hoyt?

A. No, I never have.

Q. The first time you ever saw him or heard of him?

A. That is the first.

Q. By a Juror: You saw a man get out of this parked car and run to the refinery, he had been standing there or——

A. No, I think he stopped; I understood he rushed to go to call the ambulance, because the lady was hanging out of the car, and I saw her and the other cars were stopping, and as I say, I didn't stop.

Q. Did you notice him driving ahead of you as you drove along and pull over to the side, or had he been parked there?

(Testimony of Florence Hastings.)

A. Apparently he was right ahead of the Packard and pulled to the side and stopped at the accident.

Q. By Mr. Coleman: Do you know who the man was that called the ambulance, that went into the Texaco Company?

A. Well, no, he is a man that is employed there.

Q. Do you suppose your husband could find out who that man was?

A. I suppose he could, yes.

Q. Did he witness the accident?

A. I don't think he did, he just heard the impact and [67] rushed over where he was working.

Q. By a Juror: You say you saw a man going down beyond this parked car towards the gate house?

A. Yes, he was running so I understood to call.

Q. It was a man who was employed at the Texaco Company?

A. Yes, I never saw anyone at all in the Packard when I went by; all I saw was this lady hanging out of the car.

Q. By the Coroner: When the Packard attempted to pass the car on the highway, how far was that from where the collision occurred?

A. Well, I would not know just how to say it; doesn't look like it was more than half a block, or maybe less.

(Testimony of Florence Hastings.)

The Coroner: Any other questions? (No response). That is all. Any other witnesses present? (No response).'' [68]

LILLIAN M. HOYT,

one of the defendants, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Lillian M. Hoyt.

Direct Examination

Q. By Mr. Boone: Your name is Lillian M. Hoyt? A. Yes.

Q. Where do you live, Mrs. Hoyt?

A. At the present time I am living down at Hermosa Beach.

Q. Where did you live on or about the 13th day of May, 1940? A. Rolling Hills.

Q. Do you have any recollection at this time of any incidents occurring on that date?

A. No, sir.

Q. Did you know at that time that you were involved in an automobile accident, about that time?

A. Yes.

Q. Do you recall at the present time where you had been, or what you were doing prior to the time that the accident occurred? A. No, I do not.

Q. Do you have any recollection at this time

(Testimony of Lillian M. Hoyt.)

of any [69] incident, or anything that occurred, or anything that you did for several days, or any definite period of time, prior to the accident itself?

A. No, sir.

Q. Subsequent to the accident what is the first recollection, or conscious recollection, that you have of anything, in so far as you are personally concerned?

The Court: May I project a question here to fix the time: Have you any recollection of what you did at all during that day, at any time?

A. No, I don't remember that day at all.

Q. You don't remember the day at all?

A. No.

Q. You don't remember getting into the automobile at all? A. No.

The Court: All right. I just thought that perhaps you remembered up to a certain point what you did that day.

A. I don't remember the day at all.

Q. By the Court: Do you remember the day before?

A. Right now I can't. Whether I did or not at the time I don't know.

Q. But the entire time has been blotted out, is that the idea? A. Yes.

Q. By Mr. Boone: Mrs. Hoyt, subsequent to the accident, the question was, what is the first conscious recollection [70] you have of anything, in so far as you are concerned?

(Testimony of Lillian M. Hoyt.)

A. Before or after the accident?

Q. After the accident.

A. I remember seeing my sister in the hospital; I very faintly remember that.

Q. Do you have any recollection at all, or any way of fixing how long it was after the accident occurred that you recall seeing your sister in the hospital? A. No.

Q. Do you recall at this time what date it was that you saw your sister at the hospital?

A. No.

Q. What do you recall concerning that circumstance? Will you explain in your own words the best you can what you recall concerning that?

A. Do you mean seeing my sister?

Q. Yes.

A. I can just faintly remember seeing my sister, and her son, standing by my bed; that is all I can remember.

Q. What is the next thing you can recall following the accident, that you have any clear recollection of? A. I don't know.

Q. I am not referring to that particular day, but I mean subsequent to that date, and when you were in the hospital.

A. I really don't know. I remember having some visitors. [71]

Q. When was the first time you became aware of your condition, subsequent to the accident?

(Testimony of Lillian M. Hoyt.)

A. I don't remember that either, unless it was when I first saw my sister.

Q. Was it while you were in the hospital?

A. Yes.

Q. Do you know how many days you were in the hospital? A. No.

Q. Will you describe to the court the best you can your own condition as you recall it, when you first became aware of it, after you became conscious? A. I hurt all over.

Q. Be a little more specific, if you can, please, Mrs. Hoyt.

A. I had a terrific headache; my head was hurting, and my knees were hurting.

Q. How long did that condition last?

A. I still hurt after I left the hospital.

Q. Were you having any headaches at that time?

A. Yes; always.

Q. You say "always". What do you mean by that?

A. They gave me an aspirin or two every hour or two; every time the headache started coming back they would give me an aspirin.

Q. Prior to this accident, had you been afflicted with headaches? [72] A. No.

Q. Constant headache? A. No.

Q. Had you had any physical trouble of any kind, or been under a doctor's care, prior to this accident? A. No.

Q. During the time that you were in the hos-

(Testimony of Lillian M. Hoyt.)

pital did you have any pain of any kind, other than headache?

A. As I said, my knees hurt, and my jaw and nose.

Q. Describe the sensation with reference to your jaw.

A. That was some time ago. I know it was out of shape; it was crooked, and it hurt on this side.

Q. Was that an ache? What I am trying to get at is, how did it feel? Describe it as best you can.

A. I don't know how to describe it; it just hurt. It wasn't exactly an ache.

Q. Did it hurt continuously?

A. It hurt continuously.

Q. Over what period of time, say, with reference to the time you were in the hospital?

A. I couldn't be exact.

Q. Approximate it. A. About a month.

The Court: You have a distinct recollection of the time you left the hospital, haven't you?

A. Oh, yes. [73]

Q. By Mr. Boone: During the time that you were in the hospital, Mrs. Hoyt, did you have any difficulty with your teeth?

A. I had one broken off that I had to have a cap put on.

Q. Was that work done at the hospital?

A. Yes.

Q. Which tooth? Can you describe it—point it out?

(Testimony of Lillian M. Hoyt.)

A. I can point it out. I can't describe it. It was on the left side.

The Court: What is called the eyetooth?

Mr. Boone: I don't know the name of the tooth.

Q. Prior to the accident had you had any difficulty with that tooth? A. No, sir.

Q. Was there any other work besides putting the cap on the tooth, when you were at the hospital?

A. Not while I was at the hospital.

Q. Did you have any lacerations on your head or any portion of your head?

A. Do you mean the scar here?

Q. Yes.

The Court: Cuts or tears, laceration means.

A. I had a cut on my head, and one on my chin and on my nose. I had stitches taken inside my nose.

Q. By Mr. Boone: Do you recall that being done yourself? A. No. [74]

Q. You have no recollection of that?

A. No.

Q. With reference to the cut, will you point it out? You had no marks of any kind, prior to this accident, in the general region of that cut, or scar—no scars of any kind? A. No, sir.

Q. During the time you were in the hospital what was done to you with reference to caring for that wound? A. What was done?

Q. Yes, if you recall.

A. I don't recall anything but stitches being taken out.

(Testimony of Lillian M. Hoyt.)

Q. During that time did you suffer any pain from that cut?

A. Well, it was all in that area. No, it was just all over.

Q. Will you indicate to the court where the pain or soreness was during that period of time—what portion of your head?

A. My whole forehead, and down underneath my eyebrows.

Q. You say you have a definite recollection of leaving the hospital?

A. Yes, I remember leaving the hospital.

Q. Did you return home? A. Yes.

Q. After you returned home what was the situation with reference to being up and about, and taking care of your [75] household duties?

A. I did not do anything. I would get up almost every day, and lie on the davenport. I wouldn't dress.

Q. Over what period of time, from the time you left the hospital, did this situation occur? About how long would you say?

A. Do you mean that I didn't dress, or do anything?

Q. Yes. A. About a month, I would say.

Q. During the time you were in the hospital, and during this month afterward that you described, what was the situation with reference to being nervous? Will you describe to the court how you felt in that connection, as best you can?

(Testimony of Lillian M. Hoyt.)

A. I don't know how to describe the nervousness. It seems like I would just fight constantly to keep from going to pieces; to be normal.

Q. Did you have any such difficulty as that prior to this accident? A. No, sir.

Q. How long did that situation continue with reference to your nerves, or does it still continue?

A. It still continues.

Q. Can you see any improvement, or feel any improvement in that connection?

A. No, I think it is getting worse.

Q. Have you had any difficulty with your eyes at all [76] subsequent to the accident?

A. They ache quite a bit. I don't think the eyesight is impaired.

Q. In other words, you can see just as well as you could before the accident, but your eyes ache, is that it? A. Yes.

Q. Has that situation continued from the time of the accident up to the present time?

A. Yes.

Q. Has there been any improvement in that situation?

A. No, I don't believe so. I have to wear dark glasses constantly.

Q. Had you worn glasses prior to the accident?

A. For reading I had worn glasses, yes.

Q. You have children, do you not?

A. Yes, sir.

Q. How many children? A. Three.

(Testimony of Lillian M. Hoyt.)

Mr. Stanbury: That is immaterial.

Mr. Murphy: Only in connection with the work involved in the house, if your Honor please.

The Court: There is a cause of action on the cross complaint. I think that may bear upon the cross complaint—the second cause of action, with the husband. It couldn't bear upon her, because she is merely asking general damages, and therefore the inability to care for the children, that [77] would bear only on the husband's cause of action. Let me look at the second cause of action.

Mr. Stanbury: I withdraw the objection.

The Court: Yes, there is an allegation in paragraph VIII.

Mr. Stanbury: Yes, your Honor.

The Court: Evidently it is made on the basis for expenditures of money. I will overrule the objection.

Q. By Mr. Boone: Do you recall the question?

A. I have three children.

Q. What are their ages?

A. 13, 18 and 20.

Q. Were the three children living at home?

A. Yes, sir.

Q. At the time this happened?

A. Yes, sir.

Q. Subsequent to the accident, and after you returned home, what was the situation with regard to taking care of the home, the children, getting

(Testimony of Lillian M. Hoyt.)

meals, and so forth? Were you able to do that or not?

A. No, we had to hire someone to come in and do that.

Q. Over what period of time, Mrs. Hoyt?

A. I think she was there about three months.

Q. Prior to the accident you had engaged in various activities, such as bowling, and so forth?

A. Yes. [78]

Q. Since the accident have you been able to do things of that nature?

A. No, I have tried, but I can't.

Q. During the time that you were in the hospital who was your doctor? A. Dr. Horst.

Q. Did he continue as your physician after you left the hospital?

A. No, he turned me over to my regular doctor.

Q. Who is your regular doctor?

A. Dr. Wilkie.

Q. Have you taken any treatments, or anything, from Dr. Wilkie since that date, or have you seen him?

A. He removed a couple of spots that came over the scar.

Q. How long after you left the hospital did that take place?

A. They started coming, I guess, a month or so. I had one taken off a couple of months after, and a couple of months later, I had another one taken off.

(Testimony of Lillian M. Hoyt.)

Q. Where was that work done, Mrs. Hoyt, at your home, the hospital, or where?

A. In his office.

Q. Where is his office located?

A. Hermosa Beach.

Q. Can you describe to the court what was done in that connection—what he did to you? [79]

A. He just removed the growth that was growing on the scar.

Q. Were you given an anaesthetic at that time? In other words, did that cause you any pain or suffering from that?

A. Well, it hurt, but not much.

Q. How long did that hurt, as you have described it, continue after the work was done?

A. Oh, no time at all.

Q. Was anything else done by your doctor with reference to your condition generally,—any other treatments?

A. No, sir. He called on me two or three times, but not other than that.

Q. At home? A. Yes.

Q. Referring back again to the tooth which you testified you had a cap put on at the hospital, have you had any work done on that tooth since you left the hospital? A. I had it extracted.

Q. Approximately how long ago would you say?

A. About three or four or six months ago.

Q. Do you recall the name of the dentist who handled that work? A. Dr. Tholand.

(Testimony of Lillian M. Hoyt.)

Q. Will you describe to the court what happened in that connection; that is, did they remove the entire tooth at one [80] time, or did it require more than one occasion?

A. No, the first time they left the root, and had to lance the gums to take the root out.

Q. I don't understand from that reply whether that was done at one time or on two different occasions.

A. Two different occasions.

Q. The same dentist on both occasions?

A. No.

Q. On the second occasion, when he had to lance the gum and remove the root, what dentist handled that operation?

A. Dr. Tholand.

Q. Did that cause you any pain or suffering?

A. I had an anaesthetic.

Q. Did it cause you any pain after the work was done, and after the anaesthetic was worn off?

A. No, because they kept me under hypodermics several days.

Q. What effect did these treatments on the scar and on the tooth, and so forth, have on your nerves?

A. Well, I'm terribly nervous. I guess it must have affected them.

Q. What effect, Mrs. Hoyt, has the scar which you have, had upon you when you are in the presence of other people, or out in public?

A. I am very conscious of it when I meet other people; it embarrasses me. [81]

(Testimony of Lillian M. Hoyt.)

Q. It causes you embarrassment?

A. Yes.

Q. With reference to headaches—I am not sure whether we covered this or not—are you still having those headaches?

A. I have headaches; my head hurts constantly. I don't know what kind of a hurt you would call it, but I have headaches practically every day; my head hurts constantly.

Q. Are you taking any treatments?

A. The doctor said there is nothing I can do for it.

Q. Is there anything you are taking for it at all? A. Other than aspirin.

Q. That situation did not exist prior to the accident? A. No.

Q. That is all.

Cross Examination

Q. By Mr. Stanbury: Mrs. Hoyt, you have had an operation this year for something disconnected with the accident, have you not? A. Yes.

Q. Were you in the hospital at that time?

A. The same time I had the roots removed from my gum.

Q. That was a rectal operation, was it not?

A. Yes.

Q. How long were you in the hospital at the time that [82] operation was performed?

A. About two weeks.

(Testimony of Lillian M. Hoyt.)

Q. When was that?

A. I don't remember the date.

Q. Do you remember what year it was?

A. '41.

Q. This year? A. I think so.

Q. You did not attribute that rectal operation to the accident, did you? A. No.

Q. You wore glasses before the accident, did you not? A. Yes.

Q. When you read? A. Yes.

Q. You do now? A. Yes.

Q. Your weight at the time of the accident was approximately 130 pounds, was it not?

A. Yes.

Q. That is your weight now, isn't it?

A. Yes.

Q. So far as you know, you didn't lose any weight—at least, you have no knowledge of having lost any weight during this experience?

A. No, sir. [83]

Q. The bandages had been taken off the cut upon your face by the time you went home from the hospital, had they not? A. Yes.

Q. When you went home were you confined to your bed at all, all day, any day?

A. I don't believe so. I don't remember any time.

Q. During your convalescent period you were up and down for a time, is that it?

A. Yes, sir.

(Testimony of Lillian M. Hoyt.)

Q. And since your accident—your husband is the proprietor of a heater business, I believe, is he not?

Mr. Boone: I object to that as immaterial.

Mr. Stanbury: That is preliminary, your Honor.

Q. You have worked at your husband's office since this accident, have you not?

A. Yes, I have.

Q. That is the business of which your husband is the proprietor? A. Yes.

Q. Are you still doing that?

A. I have started going back again. I have to do something to keep my mind occupied.

Q. By the Court: You did that prior to the accident, did you not? A. No, sir. [84]

Q. What kind of work do you do there?

A. I answer the telephone and file.

Q. What they call a receptionist?

A. You might call it that. I am on the switch-board.

Q. You just answer the phone? A. Yes.

Q. By Mr. Stanbury: Mrs. Hoyt, the mode by which you proceed in working is that you go to the office when your husband goes, isn't it?

A. That's right.

Q. And when he leaves you leave?

A. That's right.

Q. If he doesn't work or go to the office, or is gone a day, you don't go? A. No.

Q. But if he goes you do go?

(Testimony of Lillian M. Hoyt.)

A. Yes.

Q. You stay as long as he stays? A. Yes.

Q. And most of the time while you are there you run the switchboard, do you not?

A. Yes.

Q. That is a telephone switchboard?

A. Yes.

Q. What other type of work do you do?

The Court: What variety of switchboard is that, one or [85] two lines?

Q. By Mr. Stanbury: How many phones are there on that board? A. Six lines, I think.

Q. Do you know what kind of a switchboard that is? A. A PBX.

Q. One of those where you plug a little instrument at the end of a wire into a socket on the board? A. Yes.

Q. What you do, when a phone call comes in from the outside, you plug it in to the proper party called on the inside? A. That's right.

Q. You also are the person who gets outside calls for persons inside the organization?

A. That's right.

Q. What other work do you do while you are down at the office besides run the switchboard?

A. I do some typing and filing.

Q. Do you look after firm orders? A. No.

Q. You wore glasses before the accident? I think I asked you that.

A. For reading, yes.

(Testimony of Lillian M. Hoyt.)

Mr. Stanbury: I would like to recall Mrs. Hoyt later concerning the accident, after the other lady's testimony [86] is in. That is all at this time.

Redirect Examination

Q. By Mr. Boone: Mrs. Hoyt, have you had any change in your glasses since the accident?

A. Yes, I have.

Q. What was done in that connection?

A. One lens was changed. I don't know what.

Q. Who handled that work for you?

A. Dr. Smith.

Q. Dr. Alden Smith?

A. Dr. Alden Smith.

Q. In connection with the working at your husband's office, I think you stated you had never done any work of that kind at your husband's office prior to the accident?

A. I did, about eight years ago. I worked five months for him.

Q. Will you state to the court why you have gone to the office with him on occasions?

Mr. Stanbury: That is objected to as calling for the conclusion of the witness, and being immaterial to any issue in the case.

The Court: The only materiality of this is to show her ability to go about and perform things, as bearing upon whether there was any permanent disability that is likely to continue. Why she did it I don't think is material. [87] Some wives like

(Testimony of Lillian M. Hoyt.)

to work when their children grow up; they don't have enough other interests.

Mr. Murphy: That is true. The only point I had in mind was in connection with her condition being the reason for it.

The Court: I would not take her answer to that. That would have to be the subject of testimony. Mentally there is nothing wrong with her, according to the doctors who have testified so far.

Q. By Mr. Stanbury: You did have household help before the accident, did you not?

A. Yes, sir.

Mr. Stanbury: That is all.

Mr. Boone: By the way, Mrs. Hoyt, is there any further dental work necessary to be done?

Mr. Stanbury: I object to that as hearsay.

The Court: It would be what the doctor told her, and that would be hearsay. What is done she could testify to.

Mr. Boone: What I have in mind is whether or not it will be necessary to have a new tooth put in, or anything of that kind.

Mr. Stanbury: I don't object to that question.

The Court: She said she had the tooth extracted.

Mr. Boone: That is correct.

The Court: Have you replaced it with a bridge?

A. It has to be replaced with a bridge, and a cap put on the tip.

Mr. Boone: That will be all. [88]

GLADYS STEWART,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Mrs. Gladys Stewart.

Direct Examination

Q. By Mr. Boone: Where do you live, Mrs. Stewart? A. Long Beach.

Q. Mrs. Hoyt, who was just on the witness stand, is she a relative of yours?

A. Yes, she is.

Q. What relation?

A. She is my sister-in-law.

Q. Did you have occasion to see Mrs. Hoyt on or about the 13th day of May, 1940, the day the accident occurred? A. Yes, I did.

Q. When did you first see her on that day?

A. At the bowling alley, at 10 o'clock in the morning.

Q. Where was the bowling alley located?

A. On Anaheim; I don't know the name of the bowling alley; I guess Anaheim Bowling Alley, just the other side of Pine.

Q. In Long Beach? A. In Long Beach.

Q. What did you do during the morning?

A. We bowled. [89]

Q. Over what period of time?

A. From 10 until about 12; then had our lunch.

Q. During that period of time from 10 to 12, did either you or Mrs. Hoyt have anything to drink?

(Testimony of Gladys Stewart.)

A. Mrs. Hoyt had a bottle of beer.

Q. That was while you were bowling?

A. Yes. I don't know what time; between 10 and 12. I had a Coca-Cola.

Q. During the noon hour did you have lunch?

A. Yes.

Q. Your lunch was at the bowling alley?

A. Yes; that is where we always ate lunch, right at the bowling alley.

Q. Do you recall what Mrs. Hoyt had for lunch?

A. It seems to me that day she ordered a special salad, a sandwich and a cup of coffee.

Q. Did she have anything else to drink during lunch? A. No.

Q. About how long did it take to eat the lunch?

A. I don't know; I imagine about a half an hour or 45 minutes.

Q. After you had lunch, what did you do then?

A. Went back and bowled again.

The Court: Were you on a team, or what?

A. No, we were trying to get into one.

The Court: Did you bowl regularly, every so often? [90]

A. We were bowling about three days a week then.

Q. By Mr. Boone: After you had lunch you say you started back bowling. Did you or Mrs. Hoyt have anything to drink during the afternoon?

A. Mrs. Hoyt had another bottle of beer.

Q. About what time would you say that was, to the best of your recollection?

(Testimony of Gladys Stewart.)

A. I would think about 1:30, or a quarter to 2, maybe.

Q. Did you leave her in the afternoon at any time? A. Yes.

Q. About what time?

A. I left her at 2:30.

Q. What was she doing at the time you left her in the afternoon?

A. There was an open women's tournament that she wanted to get into, and wanted me to try; I was too tired; so she went to the other side of the alley and asked——

Mr. Stanbury: We object to what was said as hearsay.

The Court: Were you with her when she did that?

A. Yes, I was with her. She wanted me to play too, but I was too tired. I went over with her; they did not have any vacancies at that time, so we sat down and watched them bowl for a while. We went over about 2 o'clock and I left at 2:30, because I had other things to do.

Q. What was Mrs. Hoyt's condition when you left her? A. Fine. [91]

Q. Was there any evidence of drinking at all, or anything of that kind?

A. No; she wanted to bowl in the tournament.

Q. At the time you left her, what was she doing?

A. She was sitting watching the women bowl, right where I had been sitting with her.

(Testimony of Gladys Stewart.)

Q. The tournament was in progress then?

A. Yes.

Mr. Boone: That is all. Cross examine.

Cross Examination

Q. By Mr. Stanbury: Mrs. Stewart, do you know where this accident happened?

A. No, I don't know anything about the accident.

Q. You know approximately where it occurred, do you? A. Approximately, I do.

Q. You know where the Texas Company's plant is? A. Yes.

Q. So you know where it happened, at least?

A. I know where the Texas plant is, on that highway.

Q. Which way from that place was the home of Mrs. Hoyt at the time of this accident?

A. Which way from the accident was her home?

Q. Yes.

A. Wait a minute; let me see.

Q. Let me withdraw that. She lived at that time in [92] Rolling Hills, did she not?

A. Yes.

Q. Rolling Hills is a subdivision in the Palos Verdes Estate, is it not?

Mr. Boone: I object to that as being improper cross examination, your Honor.

The Court: This would not be proper cross examination. I think it is competent evidence, if you

(Testimony of Gladys Stewart.)

want to recall her. She did not testify to anything, except that she was with her and left her at 2:30.

Mr. Stanbury: I agree with the court. I will withdraw the question.

Q. Which way from the Texas Company's plant, near which this accident occurred, was the bowling alley where you last saw Mrs. Hoyt?

A. I think I am right if I say east.

Q. It's down at Long Beach?

A. Yes. I said it was off of Pine; I think just the other side of Pacific, on Anaheim Boulevard.

Q. When you last saw Mrs. Hoyt, you say it was about 2? A. 2:30.

Q. You have no knowledge of what she did after that time until the accident occurred?

A. No.

The Court: Has anybody fixed the exact hour of the accident? [93]

Mr. Stanbury: The police call was at 4:30.

The Court: Everybody admits it was still daylight. Was it March or May?

Mr. Stanbury: May, your Honor.

The Court: Then it would be daylight.

Mr. Stanbury: The accident, I assume, can be stipulated to have occurred somewhere between 4 and 4:30?

Mr. Boone: Yes.

Mr. Stanbury: The police call was at half past 4.

Mr. Boone: Some time between 4 and 4:30.

(Testimony of Gladys Stewart.)

Mr. Murphy: It was within that time.

Q. By Mr. Stanbury: You saw Mrs. Hoyt have two bottles of beer? A. Yes.

Mr. Stanbury: That is all. [94]

EZRA S. HOYT,

a witness called by and on behalf of the defendants,
being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Boone: What is your name?

A. Ezra S. Hoyt.

Q. Mr. Hoyt, you are one of the defendants, and the husband of Lillian M. Hoyt who was just on the witness stand? A. Yes, sir.

Q. Mr. Hoyt, do you recall the date of the accident, May 13, 1940? A. Yes, sir.

Q. When was the first time that you were aware that an accident had occurred?

A. 6:30 in the evening, when I arrived home.

Q. That was after you had arrived home?

A. Yes, sir.

Q. Where did you go from there?

A. I went over to the Seaside Hospital.

Q. The Seaside Hospital is located in Long Beach? A. Yes, sir.

Q. Were you admitted to the room where your wife was at that time? A. Yes.

(Testimony of Ezra S. Hoyt.)

Q. Just describe briefly her condition as you observed [95] it when you were in the room the evening of the accident.

A. She was pretty badly battered up, with a bandage over her face; her jaw hanging over to the side—her nose was pushed over to one side. She was unconscious at the time that I arrived there.

Q. How long did you stay with her that evening?

A. I had my children with me, because she hadn't come home to get dinner. The call came in, and they were waiting at the gate for me when I drove in, so I stayed about an hour, with the children out in the hall; then I took the children out, and got something to eat; then I went back over, and took the children home, and then I went back again down to the hospital, and stayed until about midnight, and then went back home again.

Q. During any of that period of time that evening, when you were at the hospital, was Mrs. Hoyt conscious at any time, or did she talk to you?

A. Not to my knowledge. I couldn't make any sense out of it at all.

Q. The following day, the 14th, did you spend any time at the hospital that day?

A. I spent all day that day.

Q. During that day did Mrs. Hoyt talk to you coherently in any respect?

A. No, sir.

Q. When was the first time that you had any

(Testimony of Ezra S. Hoyt.)

coherent [96] conversation with Mrs. Hoyt subsequent to the accident?

A. I believe that evening, the evening of the 14th, she did recognize me, but we did not have any conversation; that is, it was impossible to hold any; and I believe it was the next day before she really realized who I was, and what it was all about. And I believe that was the day that her sister was there, and, frankly, I think she recognized her sister before she did me.

Q. Can you describe to the court briefly in your own words what her condition was, as you observed it, that is, with reference to whether or not she showed any indication of suffering, or anything of that kind?

A. Do you mean at the time of the accident?

Q. No, on that second day, when she regained consciousness, or at least recognized you.

A. Yes, she was suffering.

Q. State what you observed in that connection.

A. She was moaning and complaining of hurts. She was bruised in the knees, leg, chest; her nose was over on one side; the jaw was sagging; it was starting to get back into shape a little bit. She just kind of hurt all over.

Q. How many days was she in the hospital?

A. She left the hospital about May 28th.

Q. Did you receive or pay any bills from the hospital?

A. Yes, sir.

Q. What was the amount of that hospital bill?

(Testimony of Ezra S. Hoyt.)

A. Can I refer?

The Court: Yes.

A. I believe that hospital is mixed up with the hospital bill for the tooth extraction. Do you want them separate?

Mr. Boone: I only want the Seaside Hospital.

The Court: Yes, I think they should be separated.

A. Seaside Hospital, from 5-13 to 5-28, \$192.89; special nurses, Seaside Hospital, from 5-13 to 5-28, \$225.

Q. By Mr. Boone: Did you incur any indebtedness there for medicine, or anything of that kind?

A. Medicines were included in the Seaside Hospital bill. There was a \$4 bill from Dr. O. Jolson; the name I couldn't remember the other time; he was the man who put the little cap on the tooth to save the sharp points from cutting. There was just a little cap put over the tooth in the hospital, and he charged \$4 for that.

Q. Have you paid all those bills, Mr. Hoyt?

A. Yes, sir.

Q. Were there any other indebtedness which you incurred?

A. Dr. Horst.

Q. I mean, in connection with the hospital.

A. The hospital itself at that time?

Q. Yes.

A. No, that is all I have listed at that time. [98]

Q. Who was the doctor in charge of Mrs. Hoyt's

(Testimony of Ezra S. Hoyt.)

case during the time she was in the hospital, subsequent to that?

A. Dr. Horst took care of Mrs. Hoyt while she was in the hospital. When she was released from the hospital Dr. Wilkie took over.

Q. Dr. Horst, have you any statement or bill for his services?

A. He told me the amount, and I wrote him a check.

Q. What was that amount? A. \$150.

Q. You say that has been paid?

A. That has been paid.

The Court: Did you gentlemen figure out the total?

A. I have a \$5 ambulance bill that came in.

The Court: What is the total doctors' bills and hospital bills?

A. I haven't got them sub-totaled. I have got X-rays; I have got the total of the whole thing, including this special housekeeper.

The Court: Leave the housekeeper out.

A. This was a special housekeeper; not the regular housekeeper.

The Court: Not for the present.

A. \$813.27.

Mr. Boone: Let me see if I get that straight.

A. That includes Dr. Tholand's bill, too. [99]

The Court: Go ahead. I thought you had the total.

A. I haven't got the sub-total; just the complete total, your Honor.

(Testimony of Ezra S. Hoyt.)

Q. By Mr. Boone: You have testified that after Mrs. Hoyt left the hospital, another doctor took over the case. What was his name? A. Dr. Wilkie.

Q. How long has Dr. Wilkie been acting in the capacity of her physician?

A. Well, he has been for several years.

Q. He still is?

A. He is our family consulting doctor.

Q. Have you incurred any indebtedness, in so far as he is concerned?

A. There is a \$30 charge for a consultation with Dr. Horst, and after the time of the accident, then Dr. Wilkie, I imagine \$17 beyond that is all I have charged of what I paid Dr. Wilkie towards this amount. I have the total charge, \$47 chargeable to the accident from Dr. Wilkie.

Q. After Mrs. Hoyt had returned home what was her condition, as you observed it, with reference to her ability to take care of the home, children, and so forth?

A. It wasn't possible for her to do anything; she was nervous; she was weak; she was up and she was down, and her mind was in a pretty confused state, so she wasn't in any condition to take care of her home, or her children. [100]

Q. Over what period of time did that situation last from the date of the accident?

A. I didn't feel free to release Mrs. Hoyt for anything until about October.

Q. October of what year? A. 1940.

(Testimony of Ezra S. Hoyt.)

Q. During the period of time from the date she returned home from the hospital, until October, 1940, did you employ anyone in the house to take care of the household duties, and the children?

A. I did.

Q. Who did you employ?

A. Roberta Gallik.

Q. Did you have the same person during the entire period of time?

A. I had her from about—let's see; I would like to look back, and tell you the date she came to work; the 21st of May, until August 30th. That is, in addition to our household help.

Q. What did you pay her?

A. I paid her \$70 a month.

Q. What was the total amount you paid her?

A. \$233.50.

Q. After she left, until October, who did you have in the home?

A. May I explain that we always had a man at the place, [101] taking care of the outside, and his wife assisted with the housework, and during the period until August 30th we had Roberta Gallik in to take charge of the home and run it. Then after she left I took Mrs. Hoyt and my daughter and went east. When I came back I put my youngest daughter in a boarding school, and the home problem was solved.

Q. With reference to the dentist, you have re-

(Testimony of Ezra S. Hoyt.)

ferred to a dentist bill. You include in the Seaside Hospital bill the amount of \$4?

A. That's right.

Q. What dentist has Mrs. Hoyt consulted subsequent to the time she left the Seaside Hospital?

A. Following the Seaside Hospital, we called Dr. Fridel, our regular dentist.

Q. Were you present at that time?

A. Yes.

Q. Did you incur any bill, or receive any statement in connection with work he did?

A. Yes; he took X-rays.

Q. What was the amount of that bill?

A. \$5.

Q. Has that been paid? A. Yes.

Q. After Dr. Fridel had taken the X-rays, what was done?

A. He recommended us to Dr. Borland for the extraction, as the tooth was shattered. [102]

Q. Did you go to Dr. Borland then?

A. We did.

Q. Did you incur any obligation in connection with Dr. Borland's services?

A. No, because he didn't get the tooth out. He worked on her two hours; had us both in such a state that we decided to call it off, and I took her home; she was in pretty bad shape.

Q. He never rendered a bill, and you received no statement? A. No.

Q. Who did you go to then?

(Testimony of Ezra S. Hoyt.)

A. We then went to Dr. Tholand.

Q. Dr. Tholand has handled her case since that time?

A. He was the one who removed the tooth, yes.

Q. Have you had any bill for his services?

A. Yes.

Q. What is the amount of that?

A. He had new X-rays taken by Dr. Henry (?), \$5, which I paid; then his bill for operating on the tooth was \$50, which I have his receipt for.

Q. That has been paid also? A. Yes.

Q. In connection with Mrs. Hoyt's eyes, was anything done subsequent to her returning home after the accident, with reference to her eyes? [103]

Mr. Stanbury: That is objected to upon the ground that no foundation has been laid that it was necessary as a result of this accident.

The Court: She has testified that she had her glasses changed.

(Discussion.)

Mr. Boone: I waive the question, your Honor.

The Witness: I can't ask a question, can I?

The Court: No, you merely answer the questions.

Q. By Mr. Boone: You were the owner of the Mercury automobile? A. Yes, sir.

Q. Do you know what the value of that car was just prior to the accident?

A. Well, I figured the value in this way: The car cost me \$1,205, the retail price of the car—

(Testimony of Ezra S. Hoyt.)

Q. Just state if you do know what the value of the car was just prior to the accident.

The Court: What model was it?

A. 1939 Mercury, club sedan.

Mr. Stanbury: May I just check this complaint, your Honor?

The Court: It is alleged in the cross-complaint, paragraph VI that the damage was \$654.26. The only way to prove damages, if it was not a total loss, is to show the value before and after, and, ordinarily, the price of [104] repairing. That is the standard adopted by California, in that respect, and we adopt it here, because that is the only gauge we go by.

The Witness: Do you wish me to explain how I put that in?

The Court: No.

Q. By Mr. Boone: The question is, what was the value of your car just prior to the accident.

A. I figure \$904.26.

Q. What was the value of the car subsequent to the accident?

A. It sold for \$250 to the highest bidder, the Kelley Car.

Q. Leaving the car out, do you have a total of the amount of expenditures you have testified to here?

A. I haven't got them that way, because there are some I haven't testified to.

Mr. Boone: I assumed you had everything.

(Short recess.)

(Testimony of Ezra S. Hoyt.)

Q. By Mr. Boone: Now, Mr. Hoyt, with reference to the amount of bills which you have testified to, do you have the total amount? A. I have.

Q. What is the total? A. \$1,571.65.

The Court: That includes the doctor, house-keeper, [105] dentist, and everything?

A. Yes.

Q. Is that the amount prayed in the cross-complaint, or is it larger?

A. I believe it is a little larger, if your Honor please.

The Court: That is all right; it doesn't matter; you have to prove that anyway; this is special damage.

Cross Examination

Q. By Mr. Stanbury: Mr. Hoyt, when was it that you and your wife made the trip east?

A. October, 1940.

Q. How long were you gone on that trip?

A. About three or four weeks. About three weeks, I believe.

Q. That was a train trip?

A. A train trip to Detroit, and we got a car, and drove home.

Q. Was it after you came back from the east that Mrs. Hoyt resumed her work at your office?

A. Let us put it this way: It was after she came back from the east that she went to work at my office. She was not working in my office before we went east.

(Testimony of Ezra S. Hoyt.)

Q. She said she had worked there eight years before.

A. She hadn't worked for eight years. [106]

Q. What I meant by resuming work at your office was going back to work at your office.

A. She went to work in my office after we got back, in October.

Q. That was the first time after this accident that she had worked at your office? A. Yes.

Q. She has been doing that ever since, save when she was at the Good Samaritan Hospital in 1941?

A. Yes, except this summer; she hasn't worked this summer.

Q. She hasn't worked at all this summer?

A. No; she just came back again last Wednesday.

Q. By the way, what year model was that car?

A. It was purchased new May 18, 1939.

Q. So it was just a year old, less five days, at the time of the accident? A. That is correct.

Q. You got home for dinner that night you say about 6? A. 6:30.

Q. Half past 6? A. Half past 6.

Q. That was your usual time?

A. Yes, between 6 and 6:30.

Q. You came home expecting to have your dinner at home, did you not? [107] A. Yes.

Q. How far was the scene of this accident from the place where you folks were living at that time in Rolling Hills?

(Testimony of Ezra S. Hoyt.)

A. I would judge about five to six miles; maybe seven.

Mr. Stanbury: That is all.

Mr. Murphy: Your Honor, the defendants rest their case in chief.

Mr. Stanbury: I will recall Mrs. Hoyt, if your Honor please, as an adverse witness.

The Court: All right. [108]

REBUTTAL

LILLIAN M. HOYT,

recalled as a witness on behalf of the plaintiff, having previously been sworn, testified as follows:

Direct Examination

Q. By Mr. Stanbury: Mrs. Hoyt, do you recall from other visits there, the location of the bowling alley described by your sister-in-law upon the witness stand? A. I know it's on Anaheim.

Q. I mean, you remember that bowling alley from some time or other being there, do you not?

A. Yes.

Q. It's on Anaheim near Pine in Long Beach?

A. It seems to me I used to turn up Pacific to Anaheim, so it must be near Pacific.

Q. Near Pacific and Anaheim? That is east of where the accident occurred, assuming the accident occurred on Highway 101 near the Texas Company,

(Testimony of Lillian M. Hoyt.)

is it? A. I can't place the Texas Company.

Q. You have been by since to see where the accident happened, haven't you?

A. No, sir, I don't know where the accident was.

Q. Do you know where the oil tanks are?

A. I can picture them, but I wouldn't know where they were. I remember seeing them.

Q. At the time of this accident, and prior thereto, you [109] were doing the cooking at your home, weren't you? A. Yes.

Q. You were the one that prepared the evening meal for Mr. Hoyt, and for your children?

A. Yes, sir.

Q. So far as you know, you would have prepared dinner on the day of this accident, would you not?

A. Yes, sir.

Q. You would expect your husband home some time between 6 and 6:30? A. Yes.

Q. If, at the time of this accident, you were traveling east on Highway 101, at the Texas Company plant, near the outskirts of Long Beach, you would be traveling away from your home, would you not? A. If I were traveling east, yes.

Q. Do you have any knowledge whatsoever as to how you got over from Long Beach to some place west of where the accident happened, before the accident? A. No.

Q. Do you have any knowledge as to where you were going, or what you were doing driving away from your home some time between 4 and 4:30 that afternoon?

(Testimony of Lillian M. Hoyt.)

A. No.

Mr. Stanbury: I have no further questions.

Q. By the Court: Is that car your car, or did you own [110] more than one car? I mean, was that car for your personal use, or does your husband have a car, too? A. That was my car.

Q. That was your car? A. Yes.

Q. Were you driving it every day?

A. Yes.

Q. How long had you been driving a car?

A. About 18 years.

Q. You have absolutely no recollection at all?

A. None at all.

Q. You heard your sister testify, I presume, that you and she were bowling that morning?

A. Yes.

Q. And that she left you at 2:30?

A. Yes.

Q. Does that bring to mind any remembrance of bowling on that day? A. No, sir.

Q. You remember being interested in bowling—bowling prior to that time, don't you?

A. Yes.

Q. But you don't remember what you did at that time? A. No.

Q. Do you remember having luncheon with her, and doing anything with her, which you heard her describe on the [111] stand?

A. No, sir, I don't remember the day at all.

Q. Or your remaining for a tournament.

A. No.

(Testimony of Lillian M. Hoyt.)

Q. Or trying to get into a tournament, and being told that there was no opening? A. No, sir.

Q. The place where you were going has been described; you heard it described, and it is away from your home? A. Yes.

Q. Have you any memory relative to anybody living in that direction, that would have taken you there that way, refreshing your recollection as to where you might have been going? A. No.

Q. You have no idea why you were going away from home at 4 or 4:30 in the afternoon, rather than going back toward your home to prepare the evening meal for your children? A. No.

Q. By the way, your children were going to school at that time? A. Yes.

Q. That would be about the time they would get home, or earlier than that? What grades were they in?

A. The two older ones went to the Redondo Union High School, and would get home at 4:30 or 5 o'clock; the youngest [112] one was going to Chadwick, and she would get home at 4 or 4:30.

Q. At that time was it your custom—let us take an average day, when you went downtown bowling,—when would you leave to go towards your house to return home, in case you had no other errands to do?

A. I don't know, but I always planned on being home when my youngest daughter got home; I usually did.

(Testimony of Lillian M. Hoyt.)

Q. Around 4 o'clock?

A. Yes; we always had someone at the house, though.

Q. You wanted to be there when the children got there?

A. Yes, sir.

Q. That makes it more mysterious as to why you should be miles away from home at about the time when you were accustomed to being home. You can't help us at all, can you?

A. No.

Q. Have you any friends who live in that direction where the accident occurred?

A. No one other than Mrs. Chamberlain, the lady who just testified—my sister.

Mr. Boone: You mean Mrs. Stewart?

A. I mean Mrs. Stewart; I am sorry.

Q. By the Court: You don't remember going to her house that afternoon?

A. I don't remember. [113]

Q. You don't remember being with her?

A. No.

Q. Assuming you would spend the morning, from 10 o'clock until 2:30 with her, you wouldn't be likely to be going to her house?

A. I don't know.

Q. She did not intimate that she was expecting you?

A. You asked me if I knew anyone there. She was the only one I knew.

Q. I am trying to find out if anything you did in the past might be a clue, and why you were at

(Testimony of Lillian M. Hoyt.)

a point you were not supposed to be that time of the afternoon.

A. I am sorry; I just don't know.

The Court: All right.

Q. By Mr. Boone: Mrs. Hoyt, do you recall returning to the bowling alley for any purpose at all?

A. I don't know why I should.

Q. You don't remember any reason why you should go back at all? A. No.

Mr. Boone: That is all.

Q. By Mr. Stanbury: You never found anything missing that you had with you, afterward?

A. No.

Q. You never discovered that you had lost a coat or a purse or anything of that kind? [114]

A. No.

Q. Do you recall being at that bowling alley with your sister-in-law, Mrs. Stewart, on any other occasion before this accident? A. Yes.

Q. What do you remember as to whether it was your custom to partake of beer or other alcoholic beverages while you were bowling?

A. Not very often. I had.

Q. Did you seldom partake of beer before this accident, or was it a common occurrence?

A. Seldom.

Q. By that do you mean once a month or more often than that? A. Maybe less than that.

Q. Less than once a month? A. Yes.

(Testimony of Lillian M. Hoyt.)

Q. Of course, you have no knowledge whatsoever about any drinking you had done on that day?

A. No.

Mr. Stanbury: No further questions.

Q. By Mr. Boone: In your bowling, did you have your own bowling ball? A. Yes.

Mr. Stanbury: I object to that as immaterial.

Mr. Boone: I think it is quite material. She [115] may have been returning for it. It is preliminary.

The Court: Of course we don't know whether it was in the car or not.

Mr. Boone: That is right; it is purely preliminary. I have further evidence to follow this on this phase.

Q. Did you use the bowling balls that were there for public use, or did you have your own?

A. I had my own.

Mr. Boone: That is all.

Q. By Mr. Stanbury: Do you know whether you had the bowling ball at any time with you on the day of this accident?

A. I don't remember the day of this accident, but I would imagine I had it.

Q. When did you last see that bowling ball?

A. I couldn't tell you now.

Q. When you did bowl since the accident, did you use the same ball?

A. I don't use my ball now; it's too heavy. I am not strong enough.

(Testimony of Lillian M. Hoyt.)

Q. You still have it? A. I still have it.

Q. Have you any knowledge whatsoever of anybody having gone anywhere and gotten that ball after the accident? A. No.

Mr. Boone: You mean you have no knowledge of your own? A. No knowledge of my own, no.

[116]

Mr. Stanbury: That is all.

Mr. Boone: Mr. Hoyt, resume the stand. Mr. Stanbury, do you have any further witnesses you want to call?

Mr. Stanbury: No. [117]

SURREBUTTAL

EZRA S. HOYT,

recalled as a witness on behalf of the defendants in surrebuttal, having been previously sworn, testified further as follows:

Direct Examination

Q. By Mr. Boone: Mr. Hoyt, were you familiar with the bowling ball which your wife used in bowling?

A. Yes, sir, I bought it for her birthday, May 7, 1940, a week ahead of this accident.

Q. After the accident did you go to the car to examine if the bowling ball was in the car?

A. I did.

(Testimony of Ezra S. Hoyt.)

Q. Was that bowling ball in that car?

A. No; I couldn't find it. I asked the officers at the garage, the police garage, if they found it, and they said they hadn't seen it.

Q. Did you make any other or further effort to locate that bowling ball?

A. I found out that morning that the wife had been bowling with my sister, so I called my sister about it, and asked if she had the ball, and she said——

Mr. Stanbury: Just a moment, I object——

The Court: You can't testify to that. [118]

Q. By Mr. Boone: Of course, you can't give the conversation, but other than that, did you make any other effort to locate the ball? A. No.

Mr. Boone: That is all.

Mr. Stanbury: No questions. [119]

GLADYS STEWART,

recalled as a witness on behalf of the defendants in surrebuttal, having previously been sworn, testified further as follows:

Direct Examination

Q. By Mr. Boone: Mrs. Stewart, in your bowling with your sister-in-law were you familiar with the fact that she had her own bowling ball?

A. Yes.

(Testimony of Ezra S. Hoyt.)

Q. What type of ball was it?

A. I think it was a Brunswick. A rather nice one.

Q. A Brunswick?

A. I am not sure of that.

Q. Do you recall the color? A. Black.

Q. State whether or not there were any initials on it.

A. Yes, she had her initials on it.

Q. You had seen it many times, had you?

A. Yes.

Q. You left before she did, from the bowling alley? A. Yes, I left at 2:30.

Q. When was the next time you saw the bowling ball?

A. The next day. My brother called me up that night of the accident, and asked me if I had her bowling ball, and I said no, I did not have it; that maybe she left it at the [120] alley. So I went to the bowling alley the next day, and it was there.

Q. You went to the bowling alley? A. Yes.

Q. Her ball was there?

A. Yes, it was. She had it in a case.

Mr. Boone: That is all.

Cross Examination

Q. By Mr. Stanbury: Where was it in the alley, Mrs. Stewart, when you called for it?

A. They had it in this little booth where they sign you up for the different alleys.

Q. That is, behind the counter?

(Testimony of Gladys Stewart.)

A. Yes, I guess that is what you would call it.

Q. Mrs. Hoyt's initials were on the case, too?

A. No, just on the bowling ball.

Q. That was a new ball; she just had it a short time?

A. Yes.

Mr. Stanbury: That is all.

Q. By the Court: By the way, did you ask them whether she had stored the ball with them, or whether she had left it accidentally, and had not picked it up?

A. No, I just asked them if that bowling ball was there, and they said yes, and just handed it to me, and I went home. [121]

Q. You don't know whether she left it there to call for on the following day, without having to lug it around?

A. No.

Q. Or whether she left it accidentally, and they picked it up?

A. No.

Q. You called for the ball, and they gave it to you from behind the counter?

A. Yes.

The Court: All right. Anything further, gentlemen? We are trying to get as much light as we can. [122]

LILLIAN M. HOYT,

recalled as a witness on behalf of the defendants in surrebuttal, having previously been sworn, testified further as follows:

Direct Examination

Q. By Mr. Murphy: Mrs. Hoyt, I believe this ball was purchased about May 9th, and you had used the ball on more than one occasion from the time you first got it up to the day of the accident. About how many times had you used it?

A. I don't remember. I know I had used it.

Q. Mrs. Hoyt, in using that ball, do you recall whether you kept the ball at the bowling alley, that is, rented a locker or space or room, or some similar arrangement, or did you take it home with you and bring it to the bowling alley when you would go bowling?

A. I did not leave it at the bowling alley, because I planned on going out in the evening with Mr. Hoyt to another bowling alley.

Q. You were going to bowl that evening, too?

A. I don't know.

Q. I would like specifically to ask you if you remember from the time your husband purchased that ball for you, was it your habit in using it, to take it from that one bowling alley and take it from various bowling alleys to that one, on any occasion? [123]

A. Yes.

Mr. Murphy: That is all.

(Testimony of Lillian M. Hoyt.)

Cross Examination

Q. By Mr. Stanbury: Do you remember you had rather thought of going out with Mr. Hoyt to bowl that evening?

A. No, but I know he would want to go to Long Beach if we did go bowling.

Q. You had only had the ball four days, including the fraction of the day of the accident?

A. Yes.

Q. Where had you ever bowled with it before?

A. I don't remember bowling with it any place before.

Q. So you don't remember any occasion when you either used that ball, or brought it home with you and left it, from where you were bowling, do you?

A. Yes. I remember bringing the ball home.

Q. When do you remember bringing it home?

A. I don't know. I remember bringing it home.

Q. Do you mean from the bowling alley where you came from? A. From the bowling alley.

Q. I understood you to say a moment ago that you did not have any recollection as to having bowled the ball before.

A. Yes, I have a recollection; I don't know how many [124] times. It might have been just once.

Q. Where had you bowled with it before, if you remember some occasion?

A. With Mrs. Stewart.

(Testimony of Lillian M. Hoyt.)

Q. Where? A. At Long Beach.

Q. What alley?

A. The same one we were talking about.

Q. You do not have any recollection of having used your ball at any alley other than the one at which it was found by your sister-in-law after the accident, is that right?

A. I can't now—I can't remember of any time.

Mr. Stanbury: That is all.

Mr. Murphy: We rest, your Honor.

The Court: Anything further?

Mr. Stanbury: Plaintiff rests.

(Argument.)

[Endorsed]: Filed Dec. 18, 1941. [125]

[Endorsed]: No. 10058. United States Circuit Court of Appeals for the Ninth Circuit. Lillian M. Hoyt and Ezra S. Hoyt, Jr., Appellant, vs. Sears, Roebuck and Co., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 20, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeal
for the Ninth Circuit

No. 10058

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Appellants,

vs.

SEARS, ROEBUCK AND COMPANY,
a corporation,

Appellee.

STATEMENT OF APPELLANTS' POINTS
ON APPEAL

Point I.

Under the rule announced in the case of Shamrock Oil and Gas Corporation vs. Sheets, 313 U. S. 100, the United States District Court had no jurisdiction to render any judgment in this cause and the judgment is void.

Point II.

The Appellee being a foreign corporation and having commenced this action as original plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, improperly removed the said suit to the District Court of the United States contrary to the removal statutes and any judgment rendered by the United States District Court was, under the circumstances, in excess of its jurisdiction and void and this Court should sua sponte, reverse the judgment and remove the

case to the Superior Court of the State of California, in and for the County of Los Angeles for further proceedings.

Point III.

The evidence is insufficient to support the Findings of Fact and Conclusions of Law and Judgment rendered in pursuance thereof.

Point IV.

The United States District Court erred in failing to give to appellant Lillian M. Hoyt the full benefit of the presumption that a person uses ordinary care for his own safety and concern.

The appellants respectfully designate the use in consideration of the foregoing points on appeal all of those pleadings, papers and records set forth in the Amended Designation of the papers, records, matters and evidence to be used on the record on appeal (Rule 75) heretofore served on counsel for Appellee and the original of which was filed with the Clerk of the United States District Court on January 26th, 1942.

KENNETH J. MURPHY

Attorney for Appellants

Received copy of the within this 19th day of Feb., 1942.

PARKER & STANBURY

Attorney for Appellee

[Endorsed]: Filed Feb. 21, 1942. Paul P. O'Brien, Clerk.

No. 10058

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LILLIAN M. HOYT and EZRA S. HOYT, JR.,

Appellants,

vs.

SEARS, ROEBUCK AND Co., a corporation,

Appellee.

APPELLANTS' OPENING BRIEF

KENNETH J. MURPHY,
1033 South Hope Street, Los Angeles,
Attorney for Appellants.

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PAUL P. GIBB

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No. 10058

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Appellants,

vs.

SEARS, ROEBUCK AND Co., a corporation,
Appellee.

APPELLANTS' OPENING BRIEF

**Jurisdiction of the District Court and Jurisdiction of
the Circuit Court of Appeals Upon This Appeal.**

The plaintiff Sears, Roebuck and Co., a New York corporation, commenced an action against the defendants, residents of the State of California, by filing a complaint in the Superior Court of the State of California, in and for the County of Los Angeles [Trans. pp. 2-7], seeking to recover from the defendants the sum of \$6,150.00, which the plaintiff had been forced to pay to the widow and minor child of one Henderson Hutchinson, deceased, by reason of a death benefit award made by the Industrial Accident Commission of the State of California, the death of the said Hutchinson having allegedly been caused by the negligence of the defendant Lillian M. Hoyt in the operation of a certain vehicle. The defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr. filed an answer [Trans. pp. 7-10] and a cross-complaint [Trans. pp. 11-21] in the said Superior Court action,

wherein they sought to recover the sum of \$25,000 in favor of the said Lillian M. Hoyt and the sum of \$4,921.40 in favor of the said Ezra S. Hoyt, Jr. Thereafter, the plaintiff filed a petition for removal of the cause to the United States District Court [Trans. pp. 22-26], and a bond for removal [Trans. pp. 27-29].

The Superior Court of the State of California thereupon made an order removing said cause to the United States District Court [Trans. p. 31]. The plaintiff, Sears, Roebuck and Co. filed an answer to the cross-complaint [Trans. pp. 33-37] and the cause was tried before the court without a jury and judgment entered on November 13th, 1941 in favor of the plaintiff and cross-defendant and against the defendant Lillian M. Hoyt in the sum of \$6,150.00, plus costs, and against the defendant Ezra S. Hoyt, Jr. in the sum of \$5,000.00, plus costs [Trans. pp. 49-50]. The United States District Court found that the defendant Lillian M. Hoyt was guilty of negligence which was the sole proximate cause of the accident and that the decedent Hutchinson was guilty of *no negligence* [Trans. pp. 48-58].

Notice of appeal was served and filed on December 11th, 1941 [Trans. pp. 52-53].

Appellants earnestly contend that the United States District Court had no jurisdiction to hear this cause and that the judgment is void since the cause was improperly removed to the United States District Court from the Superior Court of the State of California, in and for the County of Los Angeles.

The Circuit Court of Appeals has jurisdiction upon appeal to review the judgment in question as provided by Section 71 of Title 28 of the United States Code and Section 225 of Title 28 of the United States Code.

Statement of the Case and Errors.

The plaintiff and appellee is a corporation, organized and existing pursuant to the laws of the State of New York. On or about the 13th day of May, 1940, said corporation was the employer of one Henderson Hutchinson. Plaintiff alleged in its complaint filed in the Superior Court of the State of California, in and for the County of Los Angeles [Trans. pp. 2-7], that on said 13th day of May, 1940, the said Henderson Hutchinson, while working within the course and scope of his employment for the plaintiff, was driving and operating a motor vehicle in a westerly direction on U. S. Highway 101, between the intersections of Santa Fe avenue and Alameda street and that at said time and place the defendant Lillian M. Hoyt so negligently operated, controlled and directed a Mercury automobile in an easterly direction upon said highway as to cause the same to collide with the automobile being driven by the said Henderson Hutchinson [Trans. pp. 2-4]. That the said Henderson Hutchinson was killed as a proximate result of the negligence of the said Lillian M. Hoyt. That thereafter the Industrial Accident Commission of the State of California made a death benefit award in the sum of \$6,150.00 to the widow and minor child of the said Henderson Hutchinson, deceased, and that by reason of the foregoing the plaintiff was compelled to and did pay the said sum of \$6,150.00. Plaintiff also alleged that on the said 13th day of May, 1940, the defendant Lillian M. Hoyt was driving and operating the said Mercury motor

vehicle with the consent and permission of its owner, Ezra S. Hoyt, Jr. [Tr. pp. 5-6].

The answer of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr. denied all the material allegations of the plaintiff's complaint and set forth the defense of contributory negligence [Trans. pp. 7-10]. The defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr. filed a cross-complaint wherein it was alleged that by reason of the negligence of the said Henderson Hutchinson, the said Lillian M. Hoyt sustained certain bodily injuries and the said Ezra S. Hoyt, Jr. sustained consequential damage as a result thereof [Trans. pp. 11-21]. Upon these pleadings, the case went to trial.

The evidence indicated that a collision occurred between a Packard automobile being driven in a westerly direction on U. S. Highway 101 by the decedent, Henderson Hutchinson and a Mercury automobile being driven in an easterly direction upon said U. S. Highway 101 by the defendant Lillian M. Hoyt. No eyewitnesses to the accident testified in person at the trial. Police Officer Danielson who investigated the accident after it had occurred, testified to his investigation.

The testimony of Lenton W. Finton and Francis H. Hoffman was read to the court by the plaintiff from a transcript of testimony taken before a Coroner's Jury at an Inquest held over the body of the said Henderson Hutchinson. On behalf of the defendants, it was shown that the defendant Lillian M. Hoyt had sustained serious and permanent bodily injuries and particularly an injury

to her brain resulting in a condition known as amnesia [Trans. pp. 99-101]. As a result, the defendant Lillian M. Hoyt had no recollection whatsoever of the facts pertaining to the accident or the events leading up to the accident or any fact or circumstance occurring after the accident and pertaining thereto and she did not testify at the trial with reference to the same. On behalf of the defendants, the testimony of Florence Hastings was read from the transcript of the Coroner's Inquest.

The testimony of the witness Lenton W. Finton revealed that the Packard automobile driven by the decedent was on its wrong side of the road at the time of the impact [Trans. p. 104]. The testimony of the witness Hoffman was not conclusive as to which vehicle was on its wrong side of the road, the statement being that the accident happened on the center line [Trans. p. 108].

The testimony of the witness Florence Hastings shows that the Packard driven by the decedent was on its wrong side of the road at the time of the impact [Trans. p. 114].

The evidence would indicate that immediately to the east of the point of impact, Highway 101 curves toward the north; that just prior to the impact, the defendant Lillian M. Hoyt proceeded from the right hand lane of traffic on the highway, in the direction in which she was proceeding, toward the center line of the highway. The police officer testified that after the impact, he found tire marks approximately 48 feet in length on the highway leading from the right lane of traffic to the rear wheels

of the Mercury automobile [Trans. p. 75] and that at the time he arrived at the scene of the accident, the front end of the Mercury automobile was three or four feet over the double white line [Trans. p. 95]. The evidence indicated that the highway at the point of impact was a four lane highway—two lanes for eastbound traffic and two lanes for westbound traffic. In the center of the highway and separating the two sides was a painted double white line [Trans. pp. 95; 73]. A single painted white line separated the edge of the highway from the center line, thus dividing the highway into four lanes.

As has already been shown in the statement with reference to the jurisdiction of the Circuit Court of Appeals, this cause was originally commenced by a foreign corporation in the Superior Court of the State of California, in and for the County of Los Angeles. The cause was thereafter removed by said foreign corporation to the United States District Court upon the filing of a cross-complaint against said non-resident plaintiff, by the defendants who are residents of the State of California.

The questions then of the jurisdiction of the United States District Court, the sufficiency of the evidence to support the findings of fact, conclusions of law and judgment of the United States District Court, and whether or not the United States District Court correctly applied the law with reference to the presumption which existed in favor of the defendant Lillian M. Hoyt, a victim of amnesia, that she used ordinary care for her own con-

cerns, are the points which have been raised on this appeal and are the points upon which appellants intend to rely and which are as follows:

1. Under the rule announced in the case of *Shamrock Oil and Gas Corporation v. Sheets*, 313 U. S. 100, the United States District Court had no jurisdiction to render any judgment in this cause and the judgment is void.

2. The appellee being a foreign corporation and having commenced this action as original plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, improperly removed the said suit to the District Court of the United States contrary to the removal statutes and any judgment rendered by the United States District Court was, under the circumstances, in excess of its jurisdiction and void and this Court should *sua sponte*, reverse the judgment and remand the case to the Superior Court of the State of California, in and for the County of Los Angeles for further proceedings.

3. The evidence is insufficient to support the Findings of Fact and Conclusions of Law and Judgment rendered in pursuance thereof.

4. The United States District Court erred in failing to give to appellant Lillian M. Hoyt the full benefit of the presumption that a person uses ordinary care for his own safety and concern.

ARGUMENT.

I.

The Plaintiff Being a Foreign Corporation and Having Commenced This Action as Original Plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, Improperly Removed the Said Cause to the United States District Court, Contrary to the Removal Statutes, and the Judgment Rendered by the United States District Court Was, Under the Circumstances, in Excess of Its Jurisdiction and Void and This Court Should Sua Sponte Reverse the Judgment and Remand the Case to the Superior Court, for Further Proceedings.

Under this point, appellants will cover the first two points which are set forth in the Statement of Points on Appeal.

Plaintiff commenced this action in the Superior Court of the State of California, in and for the County of Los Angeles by filing a complaint [Trans. p. 2]. It was alleged in the complaint that the plaintiff was a corporation, organized and existing under and by virtue of the laws of the State of New York [Trans. p. 2]. Thereafter an answer and cross-complaint were filed by the defendants [Trans. pp. 7-20] and the plaintiff thereupon filed a petition for a removal of the cause to the United States District Court, wherein it was alleged that the plaintiff and the defendants were citizens of different states and that the amount prayed for in the complaint was \$6,150.00

[Trans. pp. 22-23]; that the amount prayed for in the cross-complaint of Lillian M. Hoyt was the sum of \$25,000.00 and the amount prayed for by the said Ezra S. Hoyt, Jr. was the sum of \$4,921.40 [Trans. pp. 23-24].

In the case of *Shamrock Oil and Gas Corp. v. Sheets*, 313 U. S. 100; 85 L. Ed. 1214; 61 Sup. Ct. 868, the United States Supreme Court finally laid to rest the question whether or not a non-resident plaintiff who submitted itself to the jurisdiction of the state court was thereafter entitled to remove the cause to the United States District Court upon the filing of a counter-claim or cross-complaint by the defendant in the action, and the court held that the non-resident plaintiff, *having submitted itself to the jurisdiction of the state court*, was not entitled to remove the cause to the United States District Court.

The United States Supreme Court states as follows:

“In *West v. Aurora*, 6 Wall. (U. S.) 139, 18 L. ed. 819, this Court held that removal of a cause from a state to a federal court could be effected under section 12 only by a defendant against whom the suit is brought by process served upon him. Consequently a non-citizen plaintiff in the state court, against whom the citizen-defendant had asserted in the suit a claim by way of counterclaim which, under state law, had the character of an original suit, was not entitled to remove the cause. The Court ruled that the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to

avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction.”

The court traces the history of the removal statute and concludes that Congress, in enacting the present statute of 1887 did not intend to change the rule which had been set forth in the case of *West v. Aurora*, *supra*.

The court very significantly points out:

“Not only does the language of the Act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. ‘Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.’ (Citing cases.)” (313 U. S. 100 at 107-109; 85 L. ed. 1214, at 1219.)

The plaintiff in the case at bar falls squarely within the rule announced by the Supreme Court in the *Shamrock* case. It was never the intention of Congress to allow a non-resident plaintiff who had voluntarily submitted to the forum of the State of California, to remove the cause to the United States District Court upon the filing of a cross-complaint in the action.

II.

There Is No Substantial Evidence to Support the Findings of Fact, Conclusions of Law and Judgment Entered in Pursuance Thereof.

In order to present this point, it will be necessary for appellants to refer to the testimony of the various witnesses introduced at the trial. Before doing so, however, appellants desire to point out several factors which they believe are of vital significance.

1. The testimony indicates, without conflict, that the defendant Lillian M. Hoyt sustained a brain injury in the accident, resulting in an amnesia, or total loss of memory concerning the accident and the events leading up thereto.

Dr. Dorrell G. Dickerson testified that the defendant Lillian M. Hoyt was suffering from *amnesia* [Trans. p. 100].

Plaintiff's witness Dr. W. W. Horst testified that the usual effect of a blow to the head was to *blot out the memory* [Trans. p. 67].

The defendant Lillian M. Hoyt testified that she had no recollection at the present time of the accident or what she had been doing prior to the accident [Trans. pp. 121-122]. She testified further that she did not remember the day of the accident at all.

It is settled law in California that where a person has sustained an injury which results in a loss of memory concerning the facts or circumstances surrounding an accident, that person is entitled to the benefit of the presumption that he has exercised reasonable and ordinary care for his own safety and concerns. *Hoppe v. Bradshaw*, 42 Cal. App. (2d) 334, 108 P. (2d) 947 (1941); *Scott v. Sheedy*, 39 Cal. App. (2d) 96, 102 P. (2d) 575.

2. The accident occurred on a highway which, at the point of impact, ran in an easterly and westerly direction but immediately to the east of the point of impact the highway curved toward the north [Trans. p. 83].

3. The *plaintiff's* counsel introduced into evidence the testimony of two eye-witnesses, Lenton W. Finton and Francis H. Hoffman, whose testimony is *wholly irreconcilable* with any presumption that the decedent exercised ordinary care for his own concerns.

These witnesses did not testify personally at the trial but their testimony as given at the Coroner's Inquest upon the body of the decedent was read into evidence by plaintiff's counsel.

With these preliminary observations in mind a review of the testimony reveals that the witness Lenton W. Finton testified, in part, as follows:

"Q. Then which car was on the wrong side of the highway, that is on the wrong side of the center line? A. *The Packard* when they got stopped, the Mercury was setting on that white line, or practically over it, but as near as I could tell from watching, *she did not go across that double white line.*" (Italics added.) [Trans. p. 104.]

"Q. *And at the time of the impact, the Mercury was definitely south of the center white line?* A. *Yes, sir.*" (Italics added.) [Trans. p. 105.]

The witness Francis H. Hoffman whose testimony was read by plaintiff's counsel, testified as follows:

"Q. Could you tell where the impact occurred in reference to the center line of the highway? A. I would say it was just about right where they were at, right on the center line." [Trans. p. 108.]

It might be pointed out that both the witness Finton and the witness Hoffman were traveling in an automobile behind the automobile driven by Lillian M. Hoyt, proceeding in an easterly direction on Highway 101 [Trans. pp. 102 and 109].

The only other eye-witness to the accident was Florence Hastings, whose testimony given at the Coroner's Inquest was read into the record by counsel for the defendants.

This witness was proceeding in a westerly direction on Highway 101 and was following the Packard automobile driven by the decedent [Trans. p. 113]. The witness Florence Hastings testified, in part, as follows:

“Q. Could you tell where the impact occurred in reference to the center line of the highway? A. Well, the way it looked to me, *he was on the wrong side of the street.*”

Q. Could you tell how far over the center line of the street he was? A. Well, it looked like *he was astraddle of the two lines, the center.*” (Italics added.) [Trans. p. 114.]

This witness further testified that just prior to the impact the Packard automobile had passed another vehicle [Trans. p. 113]. In this connection the witness was asked the following question:

“Q. Well, was it necessary for the Packard to straddle the center line in order to pass that car? A. No, I would not think so.” [Trans. p. 115.]

Police Officer Danielson was not an eye-witness to the accident. This witness testified that there were approximately 48 feet of skid marks leading from the right hand or southerly side of the highway to the wheels of the Mercury automobile, the front end of which was located

approximately three to four feet over the double white line at the time the officer saw it [Trans. pp. 75; 95]. This witness also testified with reference to the physical damage which was done to the respective vehicles.

It is fundamental that the burden of proving negligence rests upon the plaintiff. The mere fact that an accident occurred would not impose liability upon the defendants. *Depons v. Ariss*, 182 Cal. 485, 188 P. 797. The court must also remember that *even assuming* decedent was entitled to the benefit of the presumption that he used ordinary care, this presumption cannot be used as *substantive evidence of negligence*. *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480; 50 L. Ed. 564; *Southern R. R. Co. v. Stuart*, 115 Fed. (2d) 317.

The testimony of the eye-witnesses Finton, Hoffman and Hastings clearly demonstrates that *at no time prior to the impact was the automobile of the defendant Lillian M. Hoyt across the center line of the highway*.

Section 525 of the California Vehicle Code provides as follows:

“(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway, except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

(2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn.

(3) When the right half of a roadway is closed to traffic while under construction or repair.

(4) Upon a roadway designated and signposted for one-way traffic.

(b) The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized either by such marking or by signs and markings to designate any portion of a State highway where the volume of traffic or the vertical or other curvature of the roadway renders it hazardous to drive on the left side of such marking or signs and markings. When such marking or signs and markings are in place, the driver of a vehicle shall not drive to the left thereof."

The highway in question is a State highway and there is no dispute that in the center of said highway there was a double white line. Section 526 of the Vehicle Code of the State of California has reference to driving upon roadways lined with three or more clearly marked lanes. Subdivision (a) provides as follows:

"A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

From the evidence which has already been quoted to the court, it must be obvious that the decedent violated both of these provisions of the Vehicle Code.

Irrespective of what the evidence may show with reference to whether or not the decedent was in the act of passing another vehicle, the fact remains that the decedent was not upon his *right half* of the highway. A violation of these sections of the Vehicle Code, hereinabove set forth, *constitutes negligence as a matter of law.*

As the court says in *Olson v. Meacham*, 129 Cal. App. 670, 19 P. (2d) 527:

“In this case, driving on the wrong side of the road when there was no necessity therefor constituted negligence.”

In the case of *Surtleff v. Wyns*, 114 Cal. App. 653 at 655, 300 P. 890, the court says:

“. . . The operation of the car on the left hand side of the highway itself constituted negligence *per se.*”

See also:

Blackwell v. American Film Co., 189 Cal. 689, 209 P. 999;

Sills v. Forbes, 33 Cal. App. (2d) 219, 91 P. (2d) 246.

Appellants are at a loss to understand by what legal legerdermain the United States District Court arrived at the conclusion that the defendant Lillian M. Hoyt was guilty of negligence which was the *sole* proximate cause of the accident. The uncontradicted testimony of three eye-witnesses indicates that the defendant was not, up to

and including the time of the impact, upon the wrong side of the highway, *i. e.*, to the north of the double white line. It is true that the witness Danielson testified that the Mercury was three or four feet over the white line *after* the accident. What mechanical forces were brought into play which threw the Mercury over the white line is something which appellants are in no position to answer. It would seem to appellants, however, that the critical inquiry would be the position of the cars *at the time of the impact*. There is no evidence in the record which would support an inference that the defendant Lillian M. Hoyt was upon the wrong side of the highway at the time of the impact. In fact all of the testimony is to the contrary.

As the California court has said in the case of *Hosking v. Danforth*, 1 Cal. App. (2d) 178, 36 P. (2d) 427:

“Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; * * *”

Appellants believe that the trial court has substituted *speculation* and *conjecture* for legitimate legal proof.

It must be kept in mind at all times that the decedent cannot be given the benefit of the presumption that he

exercised ordinary care for his own concerns, since the testimony introduced by the plaintiff, *i. e.*, the testimony of the witness Finton, is irreconcilable with any such presumption. This principle of law is aptly stated in the case of *Engstrom v. Auburn Auto Sales Corp.* 11 Cal. (2d) 64, 77 P. (2d) 1059, where the court says:

“Generally speaking, however, it may be said that a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of *such party's own witness*, when such testimony was not the product of mistake or inadvertence.”

With this in mind and with the testimony of the three eye-witnesses in mind, an apt subject of inquiry is, what caused the defendant's car to veer from the right side of the highway toward the center thereof, leaving 48 feet of skid marks?

People driving on a level highway do not suddenly veer over to the middle thereof, leaving skid marks for a distance of 48 feet unless there is some reason to do so. Appellants believe that the answer may perhaps be found in the testimony of the eye-witness Florence Hastings. Before quoting from the testimony of this witness, it is well to keep in mind that the decedent was *coming off the curve* which was immediately east of the point of impact and *was passing another vehicle just prior to the impact.*

The witness Hastings testified as follows:

“Q. How fast was the Packard traveling? A. Well, I would say 45 or 50 miles per hour.” [Trans. p. 114.]

“Q. State what you saw in reference to the accident. A. Well, as I was back about two-tenths of a mile, right where the tracks cross State, the Packard went to pass another car, and he was over close to the double line in the street, and there is a curb, and as he went around the curve, the Mercury was coming from the opposite direction, and they went together, * * *.” [Trans. pp. 113-114.]

“Q. Could you tell where the impact occurred in reference to the center line of the highway? A. Well, the way it looked to me, he was on the wrong side of the street.

Q. Could you tell how far over the center line of the street he was? A. Well, it looked like he was astraddle of the two lines, the center.” [Trans p. 114.]

“Q. Well, the car that the Packard was passing, what part of the highway did that car occupy? A. Well, he was, I guess you would say in the second lane.

Q. Next to the center line? A. No, next to the shoulder.

Q. Well, was it necessary for the Packard to straddle the center line in order to pass that car? A. No, I would not think so.” [Trans. p. 115.]

The testimony of this eye-witness would indicate therefore that the decedent, traveling at a speed of between 45 to 50 miles per hour was attempting to pass another car just after he had come off the curve and that prior

to the time of the impact, the Packard was on the wrong side of the double white line which was in the center of the highway. Bearing in mind that the defendant Lillian M. Hoyt is entitled to the benefit of the presumption that she exercised ordinary care for her own concerns, it must be apparent that the sudden veering of her car was probably brought about by her belief, and a justifiable one under the circumstances, that the driver of the Packard automobile was coming off the curve and over on to her side of the road. There is nothing else to explain this sudden veering which is consistent with the presumption to which the defendant is entitled.

For a case involving a consideration of what facts are sufficient to support a finding that the driver of a vehicle was not guilty of actionable negligence merely because of the happening of an accident, see the case of *Lake v. Churchill*, 20 Cal. App. (2d) 411, 67 P. (2d) 107.

It is respectfully submitted that there is no substantial evidence supporting the finding of the trial court that the defendant Lillian M. Hoyt was guilty of negligence which was the sole proximate cause of the accident. In this respect, it is also well to keep in mind that the finding of the court is not justified if it appears that the decedent was guilty of any negligence, *contributing in the slightest degree whatsoever*, to the happening of the accident. Under the undisputed testimony of the three eye-witnesses, it is difficult for appellants to understand how this Court can say that the decedent was not himself guilty of negligence as a matter of law, proximately contributing to the accident.

III.

The Court Erred in Failing to Give to Appellant Lillian M. Hoyt the Full Benefit of the Presumption That a Person Uses Ordinary Care for His Own Safety and Concern.

This point has been partially covered under Point II in this brief. Appellants have no way of knowing what thought processes were indulged in by the trial court in order to reach its decision in this case. From a review of the evidence, however, which has already been given, the following propositions occur to appellants:

1. The testimony of the eye-witnesses is undisputed to the effect that the appellant Lillian M. Hoyt was on her own side of the highway at the time of the impact.

2. The testimony of these same witnesses reveals that the decedent was upon his wrong side of the highway at the time of the impact.

3. The testimony clearly indicates that the decedent himself violated one or more provisions of the California Vehicle Code and that he was guilty of negligence as a matter of law, proximately contributing to the happening of the accident.

In the face of the foregoing, appellants do not believe that there was sufficient evidence of negligence presented as against the appellant Lillian M. Hoyt to have overcome the presumption that she was exercising ordinary care for her own concerns. Appellants contend that all of the evidence which was introduced was consistent with

the presumption that the defendant Lillian M. Hoyt exercised ordinary care. No evidence having been introduced, sufficient to overthrow this presumption, it is apparent that the trial court has not only erred in finding that the decedent was not guilty of any negligence proximately contributing to the accident, but has also failed to give to the defendant Lillian M. Hoyt the benefit of the presumption that she used ordinary care.

Conclusion.

From the foregoing, appellants believe that the conclusion is inescapable that the United States District Court had no jurisdiction to try the cause and that, in any event, the evidence was insufficient to sustain the judgment in favor of the plaintiff.

Respectfully submitted,

KENNETH J. MURPHY,

Attorney for Appellants.

No. 10058

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LILLIAN M. HOYT and EZRA H. HOYT, JR.,

Appellants,

vs.

SEARS, ROEBUCK AND Co., a corporation,

Appellee.

APPELLEE'S BRIEF.

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No. 10058

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LILLIAN M. HOYT and EZRA H. HOYT, JR.,

Appellants,

vs.

SEARS, ROEBUCK AND Co., a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

The appellants' statement of facts in connection with their contention that the trial court had no jurisdiction of this cause is correct as far as it goes, but appellants fail to mention that after the cause had been transferred from the State court to the United States District Court they made no motion to remand the cause to the State court, nor did they at any time thereafter make any objections to any of the proceedings in the United States District Court. The appellants proceeded to trial in the United States District Court without making any objection, and they did not even make any contention as to the jurisdiction of the court when they moved for a new trial. *The contention is made for the first time on this*

appeal. As will be discussed more fully hereinafter, it is the position of the appellee that this contention of the appellants cannot be sustained at this late stage in the proceedings.

We find ourselves unable to accept appellants' statement of the facts pertaining to the manner in which the accident occurred. We shall set forth hereinafter evidence which fully supports the findings of fact, conclusions of law, and judgment in this case.

The United States District Court Had Jurisdiction to Render Judgment in This Case, and the Appellants Are Estopped From Complaining for the First Time on Appeal That This Cause Was Improperly Removed From the State Court to the United States District Court, No Motion to Remand Having Been Made, and No Objections Having Been Made in the Trial Court.

It is true, as the appellants state, at page 8 of their opening brief, that the appellee instituted this action in the State court to recover the sum of \$6150.00, and that it was not until after a cross-complaint had been filed in that court against appellee that the appellee sought and obtained removal of this cause to the United States District Court, upon the grounds that there was diversity of citizenship and that the amount prayed for in the cross-complaint was in excess of the jurisdictional sum of \$3,000.00. If the appellants had moved in the United States District Court to remand the cause to the State Court, the case of *Shamrock Oil and Gas Corp. v. Sheets*, 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868, would be applicable, because in that case the appellant had promptly moved in the United States District Court to remand the cause

to the State court, and the United States Supreme Court held that the motion to remand should have been granted.

However, in the case at bar the appellants made no effort to have the case remanded to the State court, nor did they at any time make any objections whatsoever to any of the proceedings in the United States District Court. They proceeded to trial without objection, and even made a motion for new trial without mentioning any contention that the case had been improperly removed to the United States District Court. It is on this appeal that the appellants for the first time raise the point that the cause was not properly removed to the United States District Court. Therefore, we respectfully submit that the case of Shamrock Oil and Gas Corp. v. Sheets (supra) is not applicable to the facts of this case, the appellants herein having waived the right to raise the point and being estopped from doing so at this late stage in the proceedings.

Jurisdiction of the District Court is now for the first time challenged by the appellants. There is, however, no jurisdictional question involved in this case. *At most, there was a mere irregularity which could have been cured by a motion to remand.* The District Court had before it a controversy between citizens of different states, with each party seeking to recover a sum of money in excess of the jurisdictional minimum of \$3000.00, hence it certainly had jurisdiction of the *subject matter*, and of course the matter of jurisdiction over the *person* of the parties was something which could be, and was, waived by the parties by voluntarily submitting themselves to the jurisdiction of the court. The appellants were perfectly willing to submit the case to the trial judge for decision, and they made no objection to the court exercising jurisdiction over

them. The irregularity, if any, in the method of getting the parties before the District Court did not operate to deprive that court of jurisdiction over the *subject matter* or the *parties*. *By failing to move to remand the cause to the State Court, the appellants waived any irregularity which might have been committed in the removal of the cause to the United States District Court, and even if there was irregularity in removal of the cause, the fact remains that the cause was removed to the District Court, and that court was requested by all parties to the action to proceed to render judgment therein. Inasmuch as removal proceedings are in the nature of process to bring the parties before the District Court, it naturally follows that where the District Court is presented with a cause involving the requisite diversity of citizenship and amount involved, and all of the parties voluntarily appear and submit themselves to the jurisdiction of the court and proceed to trial without objection, the court has jurisdiction of the cause and of the parties and will not, of its own motion, inquire into the regularity of the manner in which the cause came before the court.*

Mackay v. Uinta Co., 229 U. S. 173 (May 26, 1913).

Removal is a Federal question, under a Federal statute, and a motion to remand is the proper and usual method of testing the sufficiency and regularity of removal proceedings. Organic power to hear the controversy existed in the case at bar, and it is immaterial how the parties got into court; it is sufficient that they did come before the court and submit their controversy to it for decision, without raising any objection or making any attempt to prevent the court from deciding the case upon its merits. In

this case we have a situation where removal of the cause became an accomplished *fact*, and the appellants failed to exercise their right to have the cause remanded to the State court and permitted the District Court to try the case and render judgment without objection from them.

The situation in this case is the same as if each of these parties had originally filed their respective actions in the United States District Court, which could have been done in this instance because of the diversity of citizenship and the large amount of money prayed for by each of the parties. Certainly, neither party would then have contended that said court would not have jurisdiction, and it becomes apparent that the jurisdictional elements likewise existed in this case whether or not the case was irregularly brought into the United States District Court.

Having failed to move to remand the cause to the State court, and having proceeded to trial in the United States District Court, without protest, the appellants certainly acquiesced in the jurisdiction of the United States District Court over their *persons* so as to forfeit their privilege to have the case remanded to the State court. The appellants now ask this court on appeal, for the first time, to do of its own motion what they should have requested of the District Court, promptly upon removal of the case to the District Court, to-wit, to remand this case to the State court. Inasmuch as the appellants did not see fit to move to remand the case to the State court and did not make any objections whatsoever on this score until they filed their opening brief herein, there is of course no ruling of the trial court to review, because no ruling was requested or made in this connection.

We respectfully submit that the authorities are uniform to the effect that under such circumstances the District Court was entitled to proceed to render judgment, and that the appellants, disappointed in the judgment and raising the point for the first time on appeal, have waived the right to have the cause remanded to the State court.

The leading case on this question is that of *Mackay v. Uinta Development Company*, 229 U. S. 173, decided by the United States Supreme Court on May 26, 1913. In that case the Uinta Development Company, a Wyoming corporation, brought an action in the state court in Wyoming against Mackay, a Utah citizen, to recover \$1,950 damages. In an amended answer filed by Mackay, a counter-claim for \$3,000 damages was set up, and although Mackay's time to plead to the original complaint had expired, he then filed a petition to remove the case to the United States Circuit Court for the district of Wyoming, and an order of removal was granted on the theory that the parties were citizens of different states, that the amount in dispute as disclosed by the counter-claim exceeded \$2,000 and that the construction of Federal statutes was necessarily involved in the dispute. The transcript of the record was subsequently filed in the United States Court, and both parties appeared therein. The plaintiff filed in the United States Court a reply to the counter-claim, and the case was subsequently tried in said court and judgment was entered in favor of the Uinta Development Company, whereupon Mackay, disappointed at the outcome of the case, took an appeal, but on appeal neither

party raised any question as to the power of the trial court to determine the cause. The Circuit Court of Appeals, however, certified to the United States Supreme Court the following question (page 175):

“Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counter-claim and thereby have enabled the court to take cognizance thereof, did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counter-claim in that action?”

In answer to this question, the United States Supreme Court said (pages 175-177):

“This question must be answered in the affirmative and that fact makes it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for \$1,950, could, by filing a counter-

claim for \$3,000, acquire the right to remove the case to the United States court. The case was removed in fact, and, while the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause. The case, therefore, resolves itself into an inquiry as to whether, if irregularly removed, it could be lawfully tried and determined.

“Removal proceedings are in the nature of process to bring the parties before the United States court. As in other forms of process, the litigant has the right to rely upon the statute and to insist that, in compliance with its terms, the case shall be taken from the state to the Federal court in the proper district, *on motion of the proper person*, at the proper time, and on giving the proper bond. But these provisions are for the benefit of the defendant and intended to secure his appearance. When that result is accomplished by his voluntary attendance, the court will not, of its own motion, inquire as to the regularity of the issue or service of the process,—or, indeed, whether there was any process at all, since it could be waived, in whole or in part, either expressly or by failing seasonably to object. *Powers v. C. & O. Ry.*, 169 U. S. 92, 98.

“What took place in the state court may, therefore, be disregarded by the court because it was waived by the parties, and regardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the Circuit Court a controversy between citizens of different states in which the amount claimed by one non-resident was more than \$2,000. exclusive of interest and costs. As the court had jurisdiction of the subject-matter the parties

could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper. But if there was any irregularity in docketing the case or in the order of the pleadings such an irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause."

In the case of *Lopata v. Handler*, 121 Fed. (2d) 938, where it was contended that the Circuit Court of Appeals should reverse the judgment with directions to remand the case to the state court because the action was not one which was properly removable to the United States District Court, inasmuch as certain individual defendants were residents of the State of Oklahoma where the action was originally instituted and there was not a separable controversy between the plaintiffs and the other defendants, the Circuit Court of Appeals for the Tenth Circuit held, on July 24, 1941, that the plaintiffs had waived the right to have a remand of the cause to the State court.

As in the case at bar, the question of remand was raised for the first time on appeal, and the parties proceeded to trial on the merits. The action was one which could have been brought originally in the United States District Court. The Circuit Court of Appeals said (page 940):

"Where a suit is one of which a federal court may take jurisdiction, that is, a case which the plaintiff might properly bring in a federal court, and the defendant procures its removal from a state court, although such removal is wholly unauthorized, and the plaintiff acquiesces in such removal, the federal court acquires jurisdiction.

“Here, counsel for the plaintiffs affirmatively stated in open court that they would not seek to have the cause remanded, proceeded to trial on the merits, and thus waived the right to have the cause remanded.

“The motion to reverse with directions to remand the action to the state court is denied.”

In the case of *Fienup v. Kleinman*, 5 Fed. (2d) 137, where the plaintiff commenced an action in a state court against a citizen of that state and against a citizen of another state who caused the case to be removed to the Federal court, and the plaintiff subsequently asked for and obtained from the Federal court an injunction against the defendants, without making any special appearance in the Federal court or making any objections to the jurisdiction of the Federal court, but subsequently moved to remand the case to the state court, the Circuit Court of Appeals for the Eighth Circuit held that the order denying his motion to remand the case to the state court should be sustained, and that the Federal court had jurisdiction of the case. The Circuit Court of Appeals said (page 139):

“It was not until after the plaintiff had procured this injunction from the federal court below, nor until more than eight months after the order of removal of this case to that court was made, and on April 24, 1920, that Mr. Fienup made his motion to remand this case to the state court. Never prior to that day had he made any objection to the jurisdiction of the federal court below; never had he made any special appearance therein. Meanwhile he had applied to that court for and obtained from it an order for an injunction. That application was

a general appearance by him in that court, and an invocation of the exercise by that court of its general jurisdiction on his behalf, and with his long delay constituted a complete waiver of his right or privilege, if he ever had any, to a remand of this case to the state court and conclusively estopped him from obtaining such relief. 1 Foster Federal Practice (5th Ed.) p. 195, sec. 61; *In re Moore*, 209 U. S. 490, 496, 28 S. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; *Corwin Mfg. Co. v. Henrici Washer Co.* (C. C.) 151 F. 938; *Philadelphia & Boston Face Brick Co. v. Warford* (C. C.), 123 F. 843."

In the case of *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 Fed. (2d) 435, where a New York corporation brought an action in the state court of Tennessee against a Tennessee corporation, and the defendant caused the case to be removed to the United States District Court, but the plaintiff made no motion to remand the case to the state court, the Circuit Court of Appeals for the Sixth Circuit held that, although the defendant, being a resident of Tennessee, was not entitled to remove the case to the federal court, the court had jurisdiction to render judgment, and the Circuit Court of Appeals affirmed the judgment. The Circuit Court of Appeals said (pages 436, 437):

"The subject-matter of the instant suit was thus within the original jurisdiction of the District Court. Defendant's counsel says he had at the time doubt of defendant's right to remove, and that plaintiff's counsel thought the right existed. The latter says that on receipt of the notice of removal he suggested to opposing counsel that defendant was not entitled to remove, but that he would not oppose removal because he had been in doubt (presumably when commencing

suit) as to the choice of forum. Plaintiff could have brought its suit originally in the District Court below. Had the legality of the removal been questioned, plaintiff could, and presumably would, have discontinued the suit then pending in the federal court and have sued again, and—if desired—in the same District Court, which would thereby have acquired unquestioned jurisdiction. If not barred by limitation, it could presumably still sue in the court below. Plaintiff's submission to defendant's removal proceeding and the reforming of its pleadings to meet the situation was, in a not improper sense, a short cut to the same result. Save so far as implied in the direction in *Martin v. Snyder*, to remand a case 'reversed for want of jurisdiction,' we find no holding of the Supreme Court that a removal by a non-resident defendant—first provided for by the act of 1887-88 (and since *Railway Co. v. Swan and Ayers v. Watson*)—is vital to the jurisdiction of the District Court to hear the case, in the sense that the court has no discretion but to remand it, in spite of original jurisdiction to hear it and long-continued acquiescence by the parties, as well as the court's trial and decision thereunder."

* * * * *

"Whether or not in the early removal cases under the statutes of 1875 and 1887-88 the term 'jurisdiction' was used less strictly than it latterly has been, there is persuasive authority tending to support a view that jurisdiction will be retained, where as here, although the case was not technically removable under the statute, the court yet had jurisdiction over the subject-matter of the controversy, and the parties had fully consented to the federal jurisdiction and acted thereunder."

* * * * *

“We think it is not our duty, upon the situation here presented, to remand the case upon our own motion and against the wishes of both parties.”

In the case of *Fidelity & Deposit Co. of Maryland v. Burden*, 53 Fed. (2d) 381, where a case was removed to the Federal court because of the claimed existence of a diversity of citizenship and the requisite amount involved in the controversy giving jurisdiction to the court, and the appellant proceeded to trial on the merits without protest, and thereafter the appellant sought to have the case remanded to the state court, the Circuit Court of Appeals for the Second Circuit said (page 381):

“The issues presented on this appeal were disposed of in *Fidelity & Deposit Co. of Maryland v. Burden*, 30 F. (2d) 610, except that since our decision an application was made in the District Court to remand the case to the state court, which was denied. The cause was removed to the federal court because of the claimed existence of a diversity of citizenship and the requisite amount involved in the controversy giving jurisdiction to the court. The appellant proceeded to trial on the merits without protest. The court below held that this was an acquiescence in the jurisdiction of the person so as to forfeit the privilege which might have existed to remand the cause to the state court. With that determination, we agree. *Matter of Moore*, 209 U. S. 490, 28 S. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; *Mackay v. Uinta Co.*, 229 U. S. 173, 33 S. Ct. 638, 57 L. Ed. 1138; *Bailey v. Texas Co.*, 47 F. (2d) 153 (C. C. A. 2). The other issues are affirmed on the authority of *Fidelity & Deposit Co. v. Burden*, *supra*.

“Judgment affirmed.”

In the case of *Bailey v. Texas Co.*, 47 Fed. (2d) 153, where the plaintiff brought an action in the state court and one of the defendants caused the case to be removed from the state court to the United States District Court on the ground that the action against it was a separable controversy, and thereafter other defendants appeared in the United States District Court and the case was eventually tried in that court, and jurisdiction of the District Court was challenged for the first time on appeal from the judgment, the Circuit Court of Appeals for the Second Circuit held that the removal of the cause from the state court to the United States District Court was not authorized and was improper, but the Circuit Court of Appeals held that when a plaintiff goes to trial without asking for a remand, the cause being one of which the statute gives the court jurisdiction, the court may proceed to judgment.

To the same effect, see:

In re Moore, 209 U. S. 490;

Western Loan Company v. Butte, 210 U. S. 368;

Kreigh v. Westinghouse, 214 U. S. 249;

Arizona v. Clark, 235 U. S. 669;

General Investment Company v. Lake Shore, 250 Fed. 160;

Mellon v. International, 32 Fed. (2d) 390;

Jacobson v. Chicago, 66 Fed. (2d) 688;

Carpenter v. Baltimore, 109 Fed. (2d) 375.

There Is Substantial Evidence to Support the Findings of Fact, Conclusions of Law, and Judgment Entered in Pursuance Thereof, and the Trial Court Did Not Err in the Application of Presumptions.

It is specifically provided by Rule 52, Federal Rules of Civil Procedure (28 U. S. C. A., foll. sec. 723 C, page 677), that

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

In accord with the spirit and intent of said rule, this court has held that the findings of fact made by trial courts, on conflicting evidence, are presumptively correct and will not be set aside on appeal unless they are clearly erroneous.

Bolander v. Godsil, 116 Fed. (2d) 437;

Occidental Life Ins. Co. v. Thomas, 107 Fed. (2d) 876.

This court has further held that in cases of this character, the judgment of the trial court, a jury having been waived, has the force and effect of the verdict of a jury, and that the judgment will not be reversed where, as here, there is substantial evidence upon which to base it.

Independent Indemnity Company v. Sanderson, 57 Fed. (2d) 125.

With the foregoing pronouncements of law in mind, we now proceed to a recitation of the facts in the case at bar, in order to demonstrate to this court that the judgment and findings are amply supported by the facts shown in the record in this case.

It was admitted in the pleadings in this case that at the time and place of the accident which gave rise to this litigation, the defendant Lillian M. Hoyt was driving and operating a *Mercury* motor vehicle in an *easterly* direction along a public highway known as U. S. Highway No. 101, between its intersection with Santa Fe avenue and Alameda street in the County of Los Angeles, California, that at the time and place of said accident the plaintiff's employee, Henderson Hutchinson, while performing services growing out of and incidental to his employment with the plaintiff, and while acting within the scope of his employment, was driving and operating a *Packard* motor vehicle in a *westerly* direction on said highway between its intersection with Santa Fe avenue and Alameda street, that at the time and place of said accident the defendant Ezra S. Hoyt, Jr., was the owner of the *Mercury* motor vehicle driven by the defendant Lillian M. Hoyt, and that Lillian M. Hoyt was driving said automobile at said time and place with the permission and consent of Ezra S. Hoyt, Jr. It was also admitted in the pleadings that the plaintiff's said employee died on or about May 16, 1940 and left surviving him a wife, Harriett E. Hutchinson, and a son, David Keith Hutchinson, that on or about June 15, 1940 said Harriett E. Hutchinson and said David Keith Hutchinson, as the wife and minor son respectively of said employee, filed their application with the Industrial Accident Commission of the State of California against plaintiff for adjustment of claim for compensation by way of a death benefit and on or about July 22, 1940 said Commission duly made its award in favor of Harriett E. Hutchinson and David Keith Hutchinson and against the plaintiff of the death benefit in the total sum of \$6,150.00, that said award

has since and prior to the commencement of this action become final, and that by virtue of said award the plaintiff has now become obligated to pay to the said wife and son of plaintiff's employee the sum of \$6,150.00 as compensation for the death of said employee. It was further admitted in the pleadings that the plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, duly authorized to transact and now transacting business in the State of California, that more than two years prior to the commencement of this action the plaintiff duly and regularly secured from the Industrial Accident Commission of the State of California a certificate of consent to self-insure, that at all times material to this action said certificate was and now is unrevoked, and that plaintiff was and now is a self-insurer under and by virtue of the provision of the Labor Code of the State of California. [See Tr. pp. 2-17, incl.]

It is important to note that in her cause of action set forth by way of cross-complaint herein, Lillian M. Hoyt specifically alleged that at the time and place of the accident she was driving and operating a *Mercury* motor vehicle in an *easterly* direction on said highway and the decedent, Henderson S. Hutchinson, was driving and operating a *Packard* sedan in a *westerly* direction on said highway. [Tr. pp. 12, 13.]

Therefore, it will be seen that there was no dispute as to who the drivers of the cars were, nor was there any dispute as to the direction in which each car was traveling on the highway.

Robert C. Danielson, a police officer, testified that the accident occurred at a point which was 200 feet away from the nearest curve in the road. [Tr. p. 92.]

The disinterested witness, Lenton Finton, testified that he saw the Mercury car (driven by Mrs. Hoyt) suddenly swerve to the center line of this broad highway and strike the Packard car which was being driven by decedent and was approaching from the opposite direction. [Tr. pp. 102, 103.]

Finton was riding in a car being driven by one Francis Hoffman, traveling in an easterly direction on the highway behind the Mercury in the most southerly lane of this four lane highway, and Finton testified that he could see no reason why Mrs. Hoyt suddenly swerved the Mercury to the center of the highway. There was no parked car or obstruction of any sort in the south lane of the highway which would have required her to change the course of her car. [Tr. pp. 102, 103, 106.]

Mr. Hoffman also testified that the accident occurred on the center line of the highway although the Mercury had been traveling in the south lane of the highway until a moment prior to the impact. [Tr. pp. 108, 111.]

Finton testified that the two automobiles came to rest on the double center line of the highway, with the Mercury sitting cater-corner across the highway, and the Packard sitting more broadside to the road. It appeared to him as though the right side of the Mercury struck the right side of the Packard. [Tr. pp. 103, 104.]

Officer Danielson testified that this was a four lane highway, with a double line painted in the center of the highway, and that he found forty-eight feet of skid marks made by the Mercury starting from the south lane of the highway and continuing to the point of impact. [Tr. pp. 73, 75, 76; *see map*, introduced in evidence

as Joint Exhibit No. 1, and *photograph*—introduced in evidence as Plaintiff's Exhibit 1—Tr. p. 73.]

This officer further testified that he found the right front portion of the Mercury on the center line of the highway and the rest of the car north of the center line a distance of three or four feet. [Tr. p. 95.] He found that the entire front end of the Mercury was smashed in like an accordion, but there was no damage to the front of the Packard or to the left side of the Packard. The Packard was damaged from the front to the rear on its right side. [Tr. pp. 79, 80.] There was an area of debris and oil all across the center line, but there were no marks on the south side of the highway except those made by the Mercury. [Tr. p. 90.] The Packard had not left any marks indicating that its brakes had been applied, but there were some brush marks on the pavement north of the center line. These brush marks were fifteen feet in length, made by the rear wheels of the Packard in swinging from the northwest direction to the south. [Tr. pp. 88, 89, 90, 94.] The Packard was headed in a southeast direction when it came to rest after the impact. [Tr. p. 77.]

The witness Florence Hastings admitted that she noticed oil marks north of the center line of the highway. [Tr. p. 117.]

Mrs. Hoyt testified that she had no recollection of the accident. [Tr. p. 121.]

Dr. W. W. Horst, who was in charge of the Wilmington Emergency Hospital, testified that Mrs. Hoyt was seen by him at said hospital after the accident, and that she had an alcoholic breath. [Tr. pp. 60, 61.] Gladys Stewart, sister-in-law of Mrs. Hoyt, testified that Mrs.

Hoyt had drank one bottle of beer about four or five hours prior to the accident and had drank another bottle of beer about two and one-half or three hours before the accident and had then left her presence. [Tr. pp. 139, 140.] Whether or not Mrs. Hoyt had anything further to drink, or what her activities were, during the last two and one-half or three hours prior to the accident is unknown to anyone, but it is perhaps significant that although this accident occurred at about 4:30 P. M. and Mrs. Hoyt was due home soon, to take care of her children who were arriving home from school at that time, and to prepare dinner for her husband, she was five or six miles away from her home at the time of the accident and was traveling in the opposite direction from her home at the time. [Tr. pp. 155-160, incl.]

From the foregoing recitation of facts it will readily be observed that the deceased and the defendant Mrs. Hoyt were approaching each other from opposite directions and that their automobiles were involved in virtually a headon collision. After the impact the deceased's automobile was found to be entirely upon its own side of the road, while the greater portion of the defendant's automobile was found to be likewise upon the deceased's side of the road. Up to the point of impact there ran forty-eight feet of skid marks leading from the defendant's extreme right hand edge of the road over onto the deceased's side of the road. The record fails to disclose the slightest excuse or reason for the action of Mrs. Hoyt in suddenly driving her car from the extreme south side of the highway over onto the north side of the highway where the deceased was driving his car, unless the liquor which she had been drinking had so affected her as to cause her to lose control of the car. The fact that she

was traveling away from her home, rather than toward it, at a time when she should have been going toward it, and without any explanation from anyone as to why she was going in the opposite direction, might lead to the assumption that perhaps she was not at all in possession of her proper faculties at the time of the accident.

This simple factual picture leaves no doubt as to where the responsibility lies for this accident. The non-legal mind would find in it no subject for argument. It is not necessary to have reference to law governing presumptions in order to interpret such evidence as this. The only question seems to be whether there exists any legal underbrush in which a trial judge is required, as a matter of law, to obscure the plain facts. It is respectfully submitted that no such legal impediment to judicial thought exists in this case. The appellants make reference to certain testimony given by the witness Florence Hastings, but it must be remembered that Florence Hastings was a witness for the appellants, and the most that could be said for her testimony is that it creates a conflict in the evidence. Inasmuch as the conflict, if any, was resolved in favor of the appellee, her testimony becomes unimportant. Furthermore, her testimony was not of much value, because she was two-tenths of a mile away at the time of the accident and was not in as good a position to observe the true situation as were the other witnesses.

Upon the foregoing evidence, the trial court made a finding as follows:

“The Court finds that it is true that at the said time and place the defendant Lillian M. Hoyt negligently operated, controlled and directed the said Mercury automobile so as proximately to cause the same

to swerve to her left-hand side of said highway and to collide with the automobile driven by the said Henderson S. Hutchinson inflicting upon the said Henderson S. Hutchinson personal injuries which proximately resulted in his death on or about May 16, 1940.” [Tr. p. 42.]

The court made a further finding, based upon said evidence, as follows:

“The Court finds that it is not true that the plaintiff’s employee, Henderson S. Hutchinson, did not exercise ordinary care or caution or prudence at the time and place of said accident or in an effort to avoid said accident and that it is not true that the injuries sustained by the said Henderson S. Hutchinson or his death were directly or proximately caused or contributed to by any fault, carelessness or negligence on the part of the said Henderson S. Hutchinson; that it is not true that the said Henderson S. Hutchinson was careless or negligent in any respect; that the sole proximate cause of the accident and the death of the said Henderson S. Hutchinson was negligence on the part of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr.” [Tr. p. 45.]

To summarize the evidence, the findings and judgment in this case find ample support in the following facts:

1. The deceased and the defendant Lillian M. Hoyt were approaching each other from opposite directions and were involved in virtually a head-on collision.

2. After the impact the deceased’s automobile was found to be entirely upon its own side of the highway, whereas the greater portion of Mrs. Hoyt’s automobile was likewise found to be upon the deceased’s side of the road. [See photograph—Plaintiff’s Exhibit 1.]

3. Up to the point of impact there ran forty-eight feet of skid marks leading from the defendant's extreme right hand edge of the road over to the deceased's side of the road, and these marks were as straight as if laid out by surveyors' instruments, proving conclusively that they were made before the terrific collision occurred. [See photograph—Plaintiff's Exhibit 1.] They marked unmistakably the course of the defendant's vehicle over the center line of the highway *before the impact*. A disinterested eye witness following behind the defendant's automobile saw it swerve along the route of these skid marks, removing all doubt as to which car made them.

4. There is not the slightest evidence of the collision having occurred upon the defendant's own side of the highway.

5. All of the marks and debris prove that the accident occurred upon the deceased's side of the road.

6. The testimony and the physical facts prove conclusively that the defendant was on the wrong side of the highway at the time of the collision, and no excuse or explanation therefor is shown in the record.

In addition to the foregoing evidence, the findings and judgment find support in the legal presumption that the deceased exercised ordinary care for his own concern and obeyed the law.

Westberg v. Wilde, 14 Cal. (2d) 360.

The *Westberg* case settled, once and for all, the California law upon this subject. In that case, which was a death action, the plaintiffs called three eye witnesses who described the occurrence of the accident in considerable detail, yet the Supreme Court of California held that

the presumption of exercise of ordinary care on the part of the deceased was applicable. At pages 367-8 the Supreme Court of California said (emphasis added):

“We think it well to state here that in our opinion there is a substantial difference in the situation before a court where the question of the plaintiff’s negligence is in issue, and both plaintiff and his witnesses testified to all his acts and conduct at the time of his alleged negligence. from a situation where the acts and conduct of a *decedent* are the issues before the court. In the first instance, all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court, and it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence. Surely if this evidence conclusively supports the claim that he was negligent, then, according to our decisions cited above, the presumption as to his conduct has been dispelled. On the other hand, if the plaintiff has testified respecting his acts and conduct, and his testimony and that of his witnesses showed that he used ordinary care for his safety, an instruction to that effect would not be of any assistance to him, but if such evidence did not clearly and unmistakably clear him of the charge of negligence, then an instruction which would place his testimony in a more favorable light than it would be without such instruction would seem to be uncalled for, if not improper. In such case the giving of any instruction as to the presumption of plaintiff’s conduct would seem to be of doubtful propriety. It has, however, been held that the giving of such an instruction under the circumstances just related was not prejudicial. (*Tuttle v. Crawford*, 8 Cal. (2d) 126, (63 Pac. (2d) 1128); *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 38, 39 (297 Pac. 884).) But in the other situation, where

the acts and conduct of a *deceased person* are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this court following the Mar Shee case. *An instruction that the deceased is presumed to have exercised ordinary care for his own concerns is not only proper but this court, in an unbroken line of decisions, has sustained the giving of such an instruction.* (Ellison v. Lang Transp. Co., *supra*.)”

At page 365 the Supreme Court of California pointed out that the rule is firmly established in California that

“a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence.”

It is apparent, from the decision in the *Westberg* case, that there is a material difference between an action involving a living person on the one hand and one involving a deceased person on the other, although the same presumption has been applied if they were living plaintiffs. In any event, it is essential to the destruction of the presumption, as a matter of law, that the party relying thereon should have destroyed it completely and unequivocally. Certainly, none of the evidence introduced on behalf of the *appellee* destroyed the presumption existing in favor of the decedent in this case, and the evidence introduced by the appellants was not such as to overcome or destroy this presumption.

On the other hand, with respect to the claim of appellants that Mrs. Hoyt was likewise entitled to invoke the application of a presumption of due care in her favor,

we respectfully submit that the physical facts and the testimony of the witnesses overcame and dispelled any such presumption which might have existed in her favor. The evidence showed without contradiction that Mrs. Hoyt suddenly swerved her automobile from her own right hand edge of the highway over onto the left side thereof and collided with another car which was in its proper position on its own side of the road.

It is respectfully submitted that the judgment of the trial court in this case is supported in every respect by the evidence. In fact, it is difficult to perceive how any other conclusion could be drawn. The appellee's case does not depend alone upon the indulgence of a presumption in favor of the deceased, although the law warrants and dictates that the presumption should be indulged in his favor. The judgment finds ample support in the facts actually proved, without reference to any presumption. The evidence affirmatively shows that the deceased was struck while upon his own side of the road, by a sudden and unexplained movement on the part of the automobile driven by Mrs. Hoyt. *There is a total absence of any evidence that the accident was in any way contributed to by any action on the part of the deceased.* It is merely as an added foundation of the court's findings that the presumption applies. The appellants' attack upon that presumption is in the nature of an attack upon a straw man erected by the appellants themselves. *With or without the presumption, the finding of the trial court stands supported by ample testimony.* The finding of the trial court that Mrs. Hoyt was negligent is supported by the authorities cited by the appellants but directed toward the deceased in the erroneous assumption that it was the de-

ceased rather than the defendant who was upon the wrong side of the road.

The fact that the defendant Mrs. Hoyt drove her automobile onto the wrong side of the highway constitutes prima facie proof of negligence, and such prima facie proof operated in law to cast the burden on appellants to explain how Mrs. Hoyt drove her automobile to the wrong side of the highway without want of care on her part. No such explanation is shown in the record. In fact, there is no explanation whatsoever in the record as to why she drove her car to the wrong side of the road. In a similar situation, the District Court of Appeal of the State of California said, in the case of Trowbridge v. Briggs, 140 Cal. App. 554, at page 557 (Italics ours):

“At the time of collision, appellants were operating their automobile on its wrong side of the highway, meeting in a ‘head-on’ collision with that of respondent Trowbridge and wife, which machine the evidence revealed was at the time being operated on its right side of the highway at a prudent and careful speed. This constitutes negligence of a *prima facie* character, sufficient in itself to overcome the motion for nonsuit. In Lawrence v. Goodwill, 44 Cal. App. 440, 449 (186 Pac. 781), it is stated: ‘In other words, the fact that the driver of a vehicle has taken the wrong side of the highway when meeting or overtaking another where damage occurs is not conclusive, but only *prima facie* evidence of negligence which may either stand as proof of the fact or be overcome or rebutted by the circumstances of the particular case.’ *Herein such prima facie proof operated in law to cast the burden on appellants to explain that they drove their automobile to the wrong side of the highway without want of care.*”

Appellants *argue* that Mrs. Hoyt's car was not on the wrong side of the highway at the time of the accident, but the *fact* remains that the trial court's findings show that the trial court took a different view of the situation [Tr. p. 42], and the authorities cited by the appellants to the effect that operation of an automobile on the wrong side of the highway when there is no necessity therefore, constitutes negligence *per se* are applicable to the wrongful action of Mrs. Hoyt in suddenly swerving her car from the south side of the highway to the center line of the highway and crossing said center line to collide head-on with a car approaching from the opposite direction. The *arguments* advanced by the appellants are based merely upon their own *conception* of the evidence, and it is apparent that the trial court disagreed with their conception of the evidence. *The appellants offer nothing other than mere argument in an effort to account for the undisputed evidence of the lengthy skid marks left by Mrs. Hoyt's car, extending from the south side of the highway across the center line of the highway, nor do they offer anything other than mere argument in an effort to overcome the effect of the undisputed testimony of the disinterested eye witnesses to the effect that Mrs. Hoyt suddenly swerved her car from the south side of the highway to a point across the center line of the highway.*

The cases cited by appellants in support of their contention that the presumption that the deceased exercised ordinary care and obeyed the law in this case was dispelled by the evidence, are not applicable, for the reason that there was no evidence in this case which rebutted the presumption by being uncontradicted, wholly irreconcilable with the presumption, and not the result of mistake or inadvertence. The cases referred to by the appellants

hold that if the evidence produced by the prevailing party is neither uncontradicted nor wholly irreconcilable with the presumption, the presumption is not destroyed. The cases cited by the appellants also show that it is essential to the destruction of the presumption, as a matter of law, that the party relying thereon should have destroyed it completely and unequivocally *by his own evidence*. With this rule in mind, it is respectfully inquired by appellee, what is the evidence which appellee is supposed to have introduced in the case at bar which is wholly irreconcilable with the presumption that the deceased exercised ordinary care? Appellee read into evidence the testimony of two witnesses, Lenton Finton and Francis H. Hoffman, and appellee also called as a witness police officer Robert C. Danielson. *None of these witnesses testified to any fact or circumstance which was inconsistent with the physical facts.* The only testimony given by Mr. Hoffman which bore upon the manner in which the accident occurred, and the only testimony referred to by appellants, was as follows (App. Op. Br. p. 12):

“Q. Could you tell where the impact occurred in reference to the center line of the highway? A. I would say it was *just about right where they were at*, right on the center line.”

“*Just about right where they were at*” in this case happens to be upon the deceased’s side of the road. Appellee perceives in this testimony support of the court’s judgment rather than an impeachment thereof. The marks left by the appellants’ automobile prove that it had crossed the center line onto the deceased’s half of the road before the impact occurred.

The witness Lenton Finton testified that he saw the defendants' car swerve suddenly from its own right-hand edge of the highway over to the center line along the exact course where the skid marks were found. The only portion of the testimony given by this witness which is relied on by defendants, as set forth in their brief, is as follows (App. Op. Br. p. 12):

"Q. Then which car was on the wrong side of the highway, that is on the wrong side of the center line? A. The Packard; when they got stopped, the Mercury was setting on that white line, or practically over it, *but as near as I could tell* from watching, she did not go across that double white line."

* * * * *

"Q. And at the time of the impact, the Mercury was definitely south of the center white line? A. Yes sir."

It is obvious that the foregoing testimony does not even tend to rebut the presumption that the deceased had exercised ordinary care. This witness saw the car driven by Mrs. Hoyt swerve, and his testimony was manifestly material and important. This witness never saw the deceased's car at all. ("Q. Did you see the Packard before the impact? A. No sir, the first I seen it was when she hit him.") [Tr. p. 104.] He was behind Mrs. Hoyt's car, and the rear thereof was consequently more visible to him. He said "as near as I could tell" the car driven by Mrs. Hoyt did not go across the double white line. He also said that the deceased never crossed the double white line, explaining "that is hard to tell, she hit him so quick, I would say that he wasn't . . .", but it is a known fact that the defendant did cross over the double

center line. There cannot be any dispute on this subject. Not only was Mrs. Hoyt's car photographed on the wrong side of the road immediately following the accident but the perfectly straight marks leading up to it crossed over the center line several feet and were clearly made before the terrific collision occurred. [See photograph—Plaintiff's Exhibit 1.] As previously noted, they were as straight as a ruled edge and of necessity were made before being interrupted by the terrific impact. It is, therefore, manifest that a witness who states that "as near as I could tell from watching, she did not go across that double white line" is mistaken. It is seldom that witnesses to an accident observe and remember every detail. In fact, a witness who seems to do so is subject to justifiable suspicion. *This particular witness saw the defendant swerve sharply toward the deceased's half of the highway. In the rapidity of subsequent events he did not notice that she crossed the center line, but it is a known fact that she did.*

It is obvious that the testimony of this witness did not refute the presumption and is not even inconsistent therewith. He does not claim to have seen the driver on whose behalf the presumption is invoked at all. His testimony confirms the presumption, for it confirms the known physical facts, and his evidence was introduced for that purpose. It cannot seriously be contended that his testimony was either "uncontradicted" (for in the essential particular it is contradicted by the conclusively known physical facts) or that it is "wholly irreconcilable" with the presumption. Instead, his statement that the defendants' car, as far as he could tell, did not cross the center line is obviously an innocent mistake attributable to the infirmities of human observation where events occur rapidly

and under exciting circumstances. The law would be deficient in intelligence if it were incapable of reconciling known facts with such slight errors of human testimony.

The only other witnesses called by the plaintiff were the physician and the police officer, Robert C. Danielson. The physician was called to prove that the defendant had been drinking, and he gave no testimony as to the manner in which the accident occurred. Certainly it cannot be contended that the testimony of the police officer destroyed the presumption, for his evidence confirmed the physical facts. *It cannot seriously be contended that any of this evidence either destroyed or conflicted with the presumption that the deceased had exercised ordinary care. It established eccentric behavior on the part of the defendant, her course over the center of the highway before the impact, and the presence of the deceased where he belonged both at the time of the collision and thereafter.*

So far as the witness Florence Hastings is concerned, her testimony is extraneous to this discussion. She was not called as a witness for the appellee. The appellants introduced her testimony themselves and it cannot be contended that the appellee is bound thereby. However, there is nothing in her testimony inconsistent with the presumption of due care on the part of the deceased or requiring the trial court, *as a matter of law*, to blind itself to the plain facts. *This witness never saw the defendant at all.* She said she saw the deceased swerve to his left until he straddled the center line, for the purpose of passing another car. It may be that the deceased swerved to his left somewhat for the purpose of avoiding the defendant, who was heading toward his path at a speed of forty-five miles per hour, and that the witness was mistaken as to his

motive in so doing. She admitted that the car which she thought the deceased was passing was in the right-hand, outer lane, and she admitted that there would exist no reason for the deceased to swing wide in passing it. [Tr. p. 115.] The physical facts, however, prove conclusively that the impact occurred upon the deceased's half of the highway and it is evident that any observations of this witness inconsistent therewith are attributable to her extreme distance from the scene of the accident. *She was 2/10 of a mile (1056 feet) away, and a curve intervened between herself and the impact.* [Tr. pp. 113, 114.] *In any event, to reiterate, her testimony was not introduced by the plaintiff and there is no basis for the argument that by virtue thereof the plaintiff rebutted the presumption.*

It is earnestly submitted that when physical facts are clear and unequivocal, when they are established by disinterested and reliable evidence, they are often more trustworthy than the recollection of human witnesses who are subject to errors of observation and memory. In this case the physical facts are known, and the eccentric behavior of the defendant was established by an eye witness. *From the foregoing it is apparent that the finding of the court that the deceased was not guilty of contributory negligence was supported and dictated by the record. In the first place, it is required by total absence of any evidence that the deceased was guilty of contributory negligence. In the second place, it is supported and dictated by the legal and unrebutted presumption.*

The finding of the court that the defendants were guilty of negligence which was a proximate cause of the accident is supported and dictated by the authorities cited by the

defendants in their brief. Proceeding upon the erroneous premise that the deceased rather than the appellant Mrs. Hoyt was upon the wrong side of the road, the appellants have cited and quoted from certain authorities holding that the unexplained presence of a vehicle upon the left side of the road is negligence *per se*. Appellee takes the liberty of repeating the same citations and quotations contained at page 16 of appellants' opening brief. They are as follows:

“As the court says in *Olson v. Meacham*, 129 Cal. App. 670, 19 P. (2d) 527:

“‘In this case, driving on the wrong side of the road when there was no necessity therefor constituted negligence.’

“In the case of *Surtleff v. Wyns*, 114 Cal. App. 653, at 655, the court says (300 P. 890):

“‘. . . The operation of the car on the left hand side of the highway itself constituted negligence *per se*.’”

In addition the appellee again directs attention to the late case of *Trowbridge v. Briggs*, 140 Cal. App. 554, at page 557 (*supra*).

There is, therefore, complete harmony between the litigants in this case as to the *law*. It is established in appellants' own brief that to be upon the left-hand side of the road, unexplained, is negligence *per se*, and will support a judgment accordingly. The argument is made by appellants in the erroneous assumption that it was the deceased who occupied this unlawful position upon the high-

way. In fact, however, the conclusion is unmistakably as drawn by the court, that it was Mrs. Hoyt and not the deceased who was upon the wrong side of the highway and against whom these authorities must be applied.

Lastly, it is contended by defendants that they are entitled to the same presumption of due care because the memory of the defendants' driver is said to have been destroyed. The case of *Hoppe v. Bradshaw*, 42 Cal. App. (2d) 344, is cited by appellants. It is not disputed that the same presumption is applicable in the case of amnesia as in the case of death, if the court is convinced that amnesia did occur, but the fact that a presumption exists does not compel a court, *as a matter of law*, to act thereon *when there is contrary evidence*. In the *Hoppe* case a directed verdict for the defendant was reversed, not because the court was *required* to accept the presumption in lieu of contrary evidence, but because it was a jury trial and the court refused to permit the jury to *weigh* the presumption in the light of the evidence. As stated by the Supreme Court of California, in *Smellie v. Southern Pacific Co.*, 212 Cal. 540, at page 212, after declaring the existence of the presumption:

“This is undoubtedly true, but it does not necessarily follow that the presumption may not be overcome or ‘dispelled’ as a matter of law by proof of the party against whom the presumption is invoked.”

In the case at bar the defendant driver might have entered the court room with a presumption in her favor born of the absence of evidence to the contrary. When she left

the court room, however, it had been proved that she had suddenly turned from her own right-hand edge of the highway over onto the left side thereof and collided with another driver who was in his proper position on the road. If it were to be held that under such circumstances a trial court is *required* as a matter of law to accept the presumption and ignore the evidence, law suits would be decided solely on presumptions and every case would be stalemated. It is obvious that legal presumptions are not designed to emasculate and overrule proof to the contrary.

The same observations are true as to *Scott v. Sheedy*, 39 Cal. App. (2d) 96, also cited by appellants.

Conclusion.

In conclusion, we respectfully submit that the United States District Court had jurisdiction to try this cause and render judgment herein, that the appellants waived any right which they may have had to obtain an order remanding the case to the State court, and that the evidence amply supports the findings and judgment. We earnestly urge that the judgment be affirmed.

Respectfully submitted,

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No. 10058

IN THE

7

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LILLIAN M. HOYT and EZRA S. HOYT, JR.,

Appellants,

vs.

SEARS, ROEBUCK AND Co., a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

ARGUMENT.

I.

**The United States District Court Had No Jurisdiction
of This Cause and the Doctrine of Waiver Is Not
Applicable.**

Appellants respectfully submit that the case of *Shamrock Oil and Gas Corp. v. Sheets*, 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868, cited in appellants' opening brief, has definitely restricted the jurisdiction of the United States District Courts on removal of causes. In construing section 28 of the Judicial Code respecting the removal of actions and section 12 of the Judiciary Act of 1789 and section 3 of the Judiciary Act of 1875, it is

obvious that the United States Supreme Court has determined that a United States District Court has no jurisdiction over a cause which has been removed to it on the petition of the plaintiff in the state court action following the filing of a counter-claim or cross-complaint by the defendant in said action in the state court. This is true even though the requisite diversity of citizenship exists which would have enabled the plaintiff to have originally instituted the action in the United States District Court. (*Shamrock etc. v. Sheets, supra.*)

The purpose of section 3 of the Judiciary Act of 1875 and the acts of 1887 and 1888 was to circumscribe the jurisdiction of the United States District Court by limiting the right of removal to *non-resident defendants*.

The true theory behind the *Shamrock* case is that a litigant otherwise entitled to sue in the United States District Court, who has chosen the forum of the state in which to prosecute his action, is not thereafter entitled to remove the cause merely because the defendant in the state court has filed a cross-complaint. The *plaintiff* in the case at bar could have originally commenced its suit in the federal court because the necessary diversity of citizenship existed. The plaintiff however chose the forum of the State of California. Under such circumstances there can be no question of waiver on the part of the *defendant* by the mere failure to make a motion to remand the cause where the federal court, under the sections of the Judiciary Act cited in the *Shamrock* case, *supra*, had no jurisdiction to entertain the cause.

The case of *Mackay v. Uinta Development Co.*, 229 U. S. 173, 57 L. Ed. 1138, cited by appellee as determinative of the jurisdictional question involved herein, is

not in point for the reason that it involved a situation where the *non-resident defendant* filed the petition for removal coincident with *his* filing of an amended answer and cross-complaint within the jurisdictional amount of the United States District Court. Certainly such a case is different from the case at bar because the *appellant Mackay* was the person who had *instituted the removal proceedings* and who sought relief from the United States District Court. Obviously a person in his position could not thereafter attack the right of the United States District Court to hear the cause.

Appellants respectfully submit that the instant case is governed by the rule in the *Shamrock* case and that if any of the cases cited by appellee are in conflict therewith, it was the intention of the United States Supreme Court, when it decided the *Shamrock* case, to overrule any prior decisions which may have been inconsistent with the *Shamrock* case.

The United States Supreme Court in the *Shamrock* case cited with approval the case of *West v. Aurora*, 6 Wall. (U. S.) 139, 18 L. Ed. 819, where it is said:

“‘The question here is not of waiver but of the acquisition of a right which can only be conferred by an act of Congress.’”

And as the Supreme Court says in the *Shamrock* case (313 U. S. 108):

“Not only does the language of the act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal *but the policy of the successive acts of Congress regulating the jurisdiction of federal courts in one calling for the strict construction of such legislation.*”

Thus we see that there is no logical ground for contending that the jurisdiction of the federal court in cases of this character must rest upon the mere failure of a defendant to move to remand the cause.

II.

There Is No Substantial Evidence to Support the Findings of Fact, Conclusions of Law or Judgment of the Trial Court.

The appellee refers the Court to Rule 52, Federal Rules of Civil Procedure (28 U. S. C. A. 723c) which provides as follows:

“Findings of fact shall not be set aside unless clearly erroneous *and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*” (Italics ours.)

It is particularly significant to note in this case that the only persons who testified before the trial court were the two medical witnesses, Drs. Dickerson and Horst, Gladys Stewart, Ezra Hoyt, Robert C. Danielson and Lillian M. Hoyt.

The three eye witnesses to the accident, Florence Hastings, Francis H. Hoffman and Lenton W. Finton, did not testify before the trial judge. Their testimony as given before a Coroner's Jury was read into evidence at the trial from a reporter's transcript of the proceedings at the Inquest. The trial court therefore had no more opportunity to judge the credibility of these witnesses than has this Honorable Court.

So far as the witnesses who did testify at the trial are concerned, their testimony, other than that of Officer Dan-

ielson does not bear upon the manner in which the accident occurred. *Officer Danielson did not arrive at the scene of the accident until after it had occurred. He was not an eye witness.* While much of his testimony consists of his conclusions with reference to the supposed point of impact and the effect or character of various marks which were located upon the surface of the highway, his testimony, in the opinion of appellants, does not aid the appellee as will be pointed out later.

On page 22 of the reply brief, appellee summarizes the evidence which it claims supports the findings of fact, conclusions of law and judgment, in part as follows:

“(1) The deceased and the defendant Lillian M. Hoyt were approaching each other from opposite directions and were involved in *virtually* a head-on collision.” (Italics ours.)

There was no evidence presented to the trial court which would justify a conclusion that there was any head-on collision in this case. While it is true that the cars were traveling in generally easterly and westerly directions, it is apparent from all of the evidence that just prior to the impact *neither automobile* was traveling in an easterly or westerly direction. The appellee's entire reply is based upon a recitation of certain physical facts but there is one physical fact that stands out more prominently than any other in the record and one which the appellee has not explained and cannot explain to this Honorable Court.

Officer Danielson, upon whose testimony appellee so strongly relies, testified as follows:

“Q. * * * Did you notice what the damage was to the Mercury? A. The whole front end was

smashed in; the motor was knocked back; in fact, it was folded up pretty bad, the front end; it seemed like it just came together like an accordion.

Q. Did you notice what the damage was to the Packard? A. *The Packard was almost a total wreck. It started from the right front on back to the right rear.*

Q. *Along the right side?* A. *Along the right side.*

Q. Did you notice which way, in general, the metal parts on the right side of that Packard were pushed? A. *It was definitely hit from the right front fender, and pushed on back.* * * * [Tr. p. 79, fol. 23.]

A. The vehicle seemed to have been struck from the right front toward the right rear.

Q. By Mr. Stanbury: That is, the metal parts on the right side seemed to be bent backward? A. Yes, sir.

Q. *Was there any damage to the left side of that Packard, that you could see?* A. There wasn't. * * * [Tr. p. 80, fol. 24.]

Q. Is any part of the front of the Packard damaged, that you can see? A. *No part of the extreme front; just back of the right front fender.*

Q. *It starts on the side of the right front fender?* A. *Yes.*" [Tr. p. 80, fol. 24.]

With the foregoing testimony in mind, it is impossible for appellants to ascertain how the appellee can state to this Honorable Court that these two vehicles were involved in a *head-on collision*. It is true that the appellee qualifies this somewhat by stating that it was *virtually* a head-on collision, but the effect that is sought to be left in the mind

of the Court is that it was a head-on collision. Actually it was nothing of the kind as will be seen from the foregoing testimony of the police officer.

Appellants rely not only on the testimony of the three eye-witnesses in this case, who, without exception, as has already been pointed out in great detail in the appellants' opening brief, placed the point of impact on the defendant's side of the highway, but *also upon the so-called physical facts which are deemed so important by appellee.*

Appellants would like to have appellee answer one question. *If the defendant was traveling in an easterly direction on the extreme right hand side of the highway and suddenly swerved to the middle of the highway, leaving only 48 feet of skid marks from the point where she commenced to swerve her car up to the point of impact, how could the Packard automobile driven by decedent Hutchinson, traveling in a westerly direction, at all times on its own side of the highway as claimed by appellee, sustain all of its damage on the right side thereof commencing at a point back of the right front fender, with no damage to the front end of the Packard and no damage on the left side of the Packard?*

No logical answer can be found to this question which would support the appellee's theory of this case. Not only would the non-legal mind find it impossible to conclude that the decedent was in fact traveling in the manner in which the appellee would have this Court believe, but certainly the legal mind would have no difficulty in determining that it would be a *physical impossibility* for the defendant's car to have collided with the right side of the Packard automobile if the Packard automobile was at all times traveling in a westerly direction and on its own

right hand side of the center of the highway. The testimony of the police officer with reference to the skid marks and the damage to the respective vehicles proves *conclusively* that at the time of the impact the Packard automobile *must have been pointed almost due south*, otherwise the Packard would have been damaged on the front end and the left side.

Further summarizing the evidence, appellee contends on page 23 of its brief that there is not the slightest evidence of the collision having occurred on the defendant's own side of the highway.

It is difficult for appellants to understand how the appellee could in good faith make such a statement in view of the record as follows:

The testimony of Lenton W. Finton reveals that:

“Q. Then which car was on the wrong side of the highway, that is on the wrong side of the center line? A. *The Packard*; when they got stopped, the Mercury was setting on that white line, or practically over it, but as near as I could tell from watching, she did not go across that double white line.” [Tr. p. 104, fol. 50.]

In the face of such testimony from *eye witnesses* it is easy to understand why appellee *must resort* to so called “physical facts.”

Appellee attempts to discredit the testimony of this witness by asserting that “this witness never saw the decedent's car at all.” (Rep. Br. p. 30.)

While there was no minute cross-examination of this witness at the coroner's inquest which might have brought out more detail, the witness did testify that he saw the

Packard *at the time of the impact*. The witness was asked the following question:

“Q. Did you see the Packard *before* the impact?

A. No, sir, the first I seen it was *when she hit him*.”

[Tr. p. 104, fol. 50.]

It is apparent from the testimony of the witness Finton that he saw the Packard and the Mercury at the *moment of impact* and that *at that time* the Mercury was on its right side of the highway, that is, south of the center line. The fact that the defendant's car eventually wound up to the north of the double white line has no probative value whatsoever in determining the location of the point of impact. Significantly enough, the appellee read into evidence the testimony of the witness Lenton W. Finton.

The appellee likewise attacks the credibility of the witness Florence Hastings. As has already been pointed out in the appellants' opening brief, the witness Florence Hastings testified that at the time of the impact the Packard was upon the wrong side of the road. [Tr. p. 114, fol. 60.]

The appellee attacks the credibility of this witness by reason of the fact that she was two-tenths of a mile behind the car driven by the decedent. It is interesting to note that the testimony of the witness Lenton W. Finton which was introduced in evidence at the trial by appellee and the testimony of the witness Florence Hastings, introduced in evidence at the trial by appellants, was in both instances read to the Honorable Trial Judge from a transcript thereof taken at the coroner's inquest. [Tr. pp. 102 and 113.] Therefore, this Court is in just as good a position to judge the credibility of these witnesses as was the trial judge.

In view of the foregoing testimony, appellants are at a loss to understand how the appellee can assert to this Honorable Court that there was not the *slightest evidence of the collision having occurred on the defendant's side of the highway.*

Appellee refers to the fact that there were 48 feet of skid marks leading from the extreme right hand edge of the defendant's side of the road and that "these marks were as straight as if laid out by surveyors' instruments." (Rep. Br. p. 23.)

There is no testimony in the record which would support this statement that the skid marks left by the defendant's automobile were as straight as if laid out by surveyors' instruments. Officer Danielson was asked the following question:

"Q. Will you draw in the 48 feet, skid marks from the Mercury, and you may measure that off with this scale? A. *They go in a slight curve.*" [Tr. p. 77, fol. 21.]

The appellee seeks to have this Court believe that this accident is an unexplained accident; that the defendant suddenly swerved her automobile from her own right hand edge of the highway over onto the left side thereof "and collided with another car *which was in its proper position on its own side of the road.*" (Rep. Br. p. 26.) The physical facts demonstrate that decedent's car could not possibly have been in its *proper position on its own side of the road.*

Appellee attempts to attack the character of the defendant Lillian M. Hoyt by suggesting to this Honorable Court that the

“liquor which she had been drinking had so affected her as to cause her to lose control of the car. The fact that she was traveling away from her home, rather than toward it, at a time when she should have been going toward it, and without any explanation from anyone as to why she was going in the opposite direction, might lead to the assumption that perhaps she was not at all in possession of her proper faculties at the time of the accident.” (Rep. Br. pp. 20-21.)

The only testimony concerning any liquor consumed by the defendant was given by the witness Gladys Stewart who testified that prior to 2 o'clock, the defendant had two bottle of beer, one with her lunch and one after lunch. [Tr. pp. 140-141.]

The testimony of plaintiff's witness Dr. W. W. Horst was to the effect that the defendant had an alcoholic breath. [Tr. p. 61.]

There is nothing in the record which supports an inference that the defendant was intoxicated or was under the influence of intoxicating liquor.

Throughout its brief, appellee stresses the testimony of Officer Danielson that the driver of the Mercury left 48 feet of skid marks upon the surface of the highway. Appellants feel that this testimony, viewed with the testimony of the eye-witnesses and the testimony of Officer Danielson respecting the damage resulting to the Packard automobile, offers the most logical explanation for the accident. Appellee would have this Court believe that the actions of the defendant Lillian M. Hoyt in driving her automobile im-

mediately prior to the impact cannot be logically explained and that her automobile took the path it did solely by reason of the inability of the defendant to control the same by reason of the fact that she had consumed two bottles of beer. They are trying to obscure the facts from this Court as they successfully did before the trial court.

Appellants would like to ask appellee and this Court another question which they feel must be answered before this case can be disposed of. The evidence is undisputed that the appellant was driving her automobile in a normal manner on the extreme right hand edge of the pavement in front of the car driven by the witness Francis H. Hoffman and in which car the witness Lenton W. Finton was a passenger. There was no testimony which would indicate that the Mercury was being driven at an excessive or unlawful rate of speed or in an erratic manner. The only testimony with reference to the speed of the Mercury was given by the witnesses Finton and Hoffman, both of whom testified that the Mercury was traveling approximately 40 miles per hour. [Tr. pp. 106, 109.] No witness knew what caused the Mercury to swerve but the testimony is undisputed that the defendant's car suddenly swerved from the extreme right hand edge of the pavement toward the center of the highway, *leaving 48 feet of skid marks*. Appellee suggests that a driver of an automobile who is under the influence of intoxicating liquor might suddenly, for no reason at all, swerve from the side of the highway toward the center thereof. There is no question but that a person who is under the influence of intoxicating

liquor might suddenly swerve toward the center of the highway, for no apparent reason, but would such a person apply his brakes so that they would leave solid skid marks for a distance of 48 feet up to the point of impact? Appellants submit that the defendant Lillian M. Hoyt swerved her car to the left and applied her brakes as hard as she could because the decedent Hutchinson was coming off the curve which was immediately to the east of the point of impact, heading directly toward the defendant and causing her to believe that he would proceed directly into her path. The application of brakes indicates an *attempt to contro!* and not a sudden erratic *uncontrollable* act.

Did the decedent leave any skid marks? The answer is no, despite the fact that if the accident happened as appellee states, the defendant's car must have been obviously turning toward the center for 48 feet! All the decedent left were brush marks. The police officer testified that the decedent's automobile left 15 feet of brush marks. [Tr. p. 88.] This Court can take judicial knowledge of the fact that brush marks are caused, not by the application of brakes, but by the turning of an automobile while traveling at a high rate of speed. Officer Danielson testified:

“Q. That is to say, whatever marks may appear upon this variety of photographs, taken after the cars were removed, none of them are to be taken as indicating that the brakes on this Packard had been applied before the impact? A. That is what I would say.

Q. You saw no such marks? A. I saw no such marks.” [Tr. pp. 89-90.]

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

THE COAST WINERIES, Inc., a corporation, and
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

MAY 11 1942

PAUL P. O'BRIEN,

No. 10061

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

THE COAST WINERIES, Inc., a corporation, and
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Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
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Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Seattle, Washington.

GERALD DeGARMO

1308-16 Northern Life Tower
Seattle, Washington.

Attorneys for Defendants and Appellee. [1*]

United States District Court, Western District of
Washington, Northern Division.

No. 136

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE COAST WINERIES, INC., a corporation,
and UNITED STATES FIDELITY AND
GUARANTY COMPANY, a Corporation,
Defendants.

COMPLAINT.

Comes now the plaintiff by and through J. Charles Dennis, United States Attorney for the Western District of Washington, its attorney, and for a cause of action against the defendants alleges:

I.

That the United States of America, plaintiff herein, was at all times herein mentioned, and now is a corporation sovereign.

II.

That at all times herein mentioned, the defendant, United States Fidelity and Guaranty Company, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, having its principal office at Baltimore, Maryland, and duly authorized to do business, and

doing a general surety-ship business, in the State of Washington.

III.

That the defendant, The Coast Wineries, Inc., was at all times herein mentioned a corporation organized and doing [2] business under and by virtue of the laws of the State of Washington with its principal place of business at Yakima, Washington.

IV.

That The Coast Wineries, Inc. was engaged in the business of making and selling wines, and to secure the faithful compliance with all laws and regulations respecting the production, storage, sale and removal of all wines, and to secure the payment of all taxes, the defendant, The Coast Wineries, Inc. as principal, and the United States Fidelity and Guaranty Company as surety, on February 1, 1934, executed a bond in the sum of \$5,000.00, and on August 9, 1934, the said defendants executed an additional bond in the sum of \$3,000.00, true and correct copies of which said bonds are hereto attached marked Exhibits A and B respectively.

V.

That during the time the said bonds were in full force and effect the defendant, The Coast Wineries, Inc., mixed a large quantity of wine with glycerine and other ingredients, thereby incurring a tax on such wines at the rate of .30¢ per gallon.

VI.

That by reason of the mixing of such wines, the Collector of Internal Revenue levied and assessed against The Coast Wineries, Inc. a tax for \$3,162.56, at .30¢ per gallon on 10,541.88 proof gallons. Said assessment being entered on the Collector's books D. S. 1935, February 1, Supple 0/0. [3]

VII.

That thereafter the Collector of Internal Revenue notified the said defendant of the levy and assessment as aforesaid and demanded payment thereof, and thereafter demand was also made upon the United States Fidelity and Guaranty Company.

VIII.

That no part of said taxes, penalties and interest has been paid and the defendants refuse to pay the same.

Wherefore, the plaintiff prays that judgment be entered against the defendants jointly and severally for the sum of \$3,162.56, together with interest and penalties and all costs, and such other further relief as to this Honorable Court seems just and proper.

J. CHARLES DENNIS

United States Attorney

GERALD SHUCKLIN

Asst. United States Attorney. [4]

EXHIBIT A

Form 699

Treasury Department

Bureau of Industrial Alcohol

November, 1933

BOND OF WINEMAKER OR DEALER

Know All Men By These Presents, That The Coast Wineries, Inc. under the laws of the State of Washington of Yakima, Washington, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, Inc. under the laws of the State of Maryland, as surety, are held and firmly bound unto the United States of America in the sum of Five Thousand and No/100 dollars (\$5,000.00), lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

This bond shall not in any case be effective before the first day of February, 1934, but if accepted by the United States it shall be effective according to its terms on and after that date without notice to the obligors. If this blank date is not filled in the date of execution shall be the effective date of the bond.

Whereas the above-bounden principal is engaged or intends to engage in business of MAKING AND selling domestic wines on premises located at 213 West "C" Street, Yakima, Washington, in the collection district of Washington.

“Now, therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the United States and regulations issued in pursuance thereof respecting the PRODUCTION, storage, sale, or removal, and the accounting of all wines produced or received by him, or which now remain on said premises; and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; otherwise to remain in full force and effect.”

Witness our hands and seals this 1st day of February, 1934.

(Seal) THE COAST WINERIES, INC.

By /s/ E. G. McKENZIE, Pres.

/s/ M. V. HUBBERT, Sec.-Treas.

(Seal) UNITED STATES FIDELITY
AND GUARANTY COMPANY

/s/ D. H. McCOLLISTER,

Attorney-in-fact.

Signed, sealed, and delivered in the presence of—

/s/ C. F. COWDEN

/s/ J. C. BEESON

Approved Mar. 22, 1934

/s/ O. K. NICKERSON

Acting Dist. Supervisor 12th District.

The rate of premium on this bond is 20.00 per thousand; the total amount of premium charged is \$100.00.

Note. Words capitalized to be stricken out when bond is given by a dealer only. [5]

EXHIBIT B

Form 699

Treasury Department

Bureau of Industrial Alcohol

November, 1933

BOND OF WINEMAKER OR DEALER.

Know All Men By These Presents, That The Coast Wineries, Inc., a corporation, incorporated under the laws of the State of Washington, of Yakima, Wash., as principal, and United States Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, and..... of....., as sureties, are held and firmly bound unto the United States of America in the sum of Three Thousand and no/100 Dollars (\$3,000.00), lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

This bond shall not in any case be effective before the 9th day of August, 1947, but if accepted by the United States it shall be effective according to its terms on and after that date without notice to the obligors. If this blank date is not filled in the date of execution shall be the effective date of the bond.

Whereas the above-bounden principal is engaged or intends to engage in business of MAKING AND selling domestic wines on premises located at 213 W. "C" Street, Yakima in the Twelfth collection district of Washington.

Now, therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the United States and regulations issued in pursuance thereof respecting the PRODUCTION, storage, sale, or removal, and the accounting of all wines produced or received by him, or which now remain on said premises; and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 9th day of August, 1934.

(Seal) THE COAST WINERIES, INC.
E. G. McKENZIE, Vice
By MAUDE V. HUBBARD,
Secy-Treas.

(Seal) UNITED STATES FIDELITY
& GUARANTY COMPANY

(Seal) By JOHN C. M. COLLISTER
Attorney-in-fact [6]

Signed, sealed, and delivered in the presence of
LOETA HERSCHI

Approved August 20, 1934.

ROY C. LYLE

Astg. Dist. Supervisor 15th District.

Note.—Words capitalized to be stricken out when
bond is given by dealer only.

The rate of premium on this bond is \$20.00 per
thousand: the total amount of premium charged is
\$60.00. [7]

United States of America
Western District of Washington
Northern Division—ss.

Gerald Shucklin, being first duly sworn, on oath deposes and says:

That he is Assistant United States Attorney for the Western District of Washington and as such makes this verification for and on behalf of the United States of America.

That he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

(Sgd.) GERALD SHUCKLIN

Subscribed and sworn to before me this 15th day of December, 1939.

(Seal) (Sgd.) R. B. ALLEN

Deputy Clerk, U. S. District
Court, Western District of
Washington. [8]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 15, 1939. Elmer Dover, Clerk, By R. B. Allen, Deputy.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, UNITED STATES
FIDELITY AND GUARANTY COMPANY,
a Corporation.

Comes now the United States Fidelity and Guaranty Company, a corporation, one of the defendants in the above entitled action, and for answer to the Complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Admits each and every allegation of Paragraphs I and II of the plaintiff's Complaint, and the whole of said paragraphs.

II.

For answer to Paragraph III of the plaintiff's Complaint, admits that The Coast Wineries, Inc. was at one time a corporation organized and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at Yakima, Washington; and denies the remainder of said paragraph. [9]

III.

For answer to Paragraph IV of the plaintiff's Complaint, admits that The Coast Wineries, Inc. was engaged in the business of making and selling wines, and to secure the faithful compliance with all laws and regulations respecting the production, storage, sale and removal of all wines, and to secure the payment of all taxes due on said wines at

the time and in the manner required by said laws and regulations, the defendant, The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, on February 1, 1934 executed a bond in the sum of \$5,000.00, a true and correct copy of which is attached to the plaintiff's Complaint herein as "Exhibit A"; and on August 9, 1934 the defendant The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, executed a bond in the sum of \$3,000.00, a true and correct copy of which is attached to the plaintiff's Complaint herein as "Exhibit B"; and except as herein specifically admitted, denies each and every other allegation in said paragraph contained.

IV.

For answer to Paragraph V of the plaintiff's Complaint, specifically denies that during the time said bonds were in full force and effect the defendant, The Coast Wineries, Inc., mixed a large quantity of wine with glycerine and/or other ingredients, or that a tax was incurred to the United States of America on such wines at the rate of 30¢ per gallon, or any sum whatsoever.

V.

For answer to Paragraph VI of the plaintiff's Complaint, admits that the Collector of Internal Revenue [10] claims to have levied and assessed against The Coast Wineries, Inc., on account of the

alleged mixing of such wines, a tax for \$3,162.56, at 30¢ per gallon on 10,541.88 proof gallons, and that said assessment was entered on the Collector's books D. S. 1935, February 1, Supple O/O; and denies each and every other allegation in said paragraph contained not herein specifically admitted.

VI.

For answer to Paragraph VII of said Complaint, admits that prior to the commencement of this action demand was made upon the United States Fidelity and Guaranty Company to pay the claimed taxes, as sued upon herein, and states that it does not have sufficient knowledge or information upon which to form a belief as to the truth or falsity of the other allegations of said paragraph and, therefore, denies the same.

VII.

For answer to Paragraph VIII of the plaintiff's Complaint, admits that this answering defendant, the United States Fidelity and Guaranty Company, a corporation, has refused and now refuses to pay the taxes as claimed by the plaintiff herein, and denies the other allegations in said paragraph contained not herein specifically admitted.

And by way of further answer to the plaintiff's complaint, and as a first affirmative defense thereto, the United States Fidelity and Guaranty Company, a corporation, defendant herein, alleges:

I.

That subsequent to the execution by the defendant, United States Fidelity and Guaranty Company, as surety, of the bonds, copies of which are attached to the plaintiff's Complaint, as "Exhibit A" and "Exhibit B", [11] and subsequent to the assessment by the Collector of Internal Revenue of the taxes as claimed by Paragraph VI of the Complaint herein, said The Coast Wineries, Inc. was adjudicated a bankrupt in the United States District Court for the Eastern District of Washington, Southern Division, under Cause Number B-1959; and that subsequent to said adjudication in bankruptcy a trustee was appointed for said bankrupt corporation and sufficient funds and assets came into the hands of said Trustee in Bankruptcy, to pay and discharge all claims for taxes due, or asserted as being due, from said The Coast Wineries, Inc. to the United States of America.

II.

That pursuant to the direction of the Commissioner of Internal Revenue for the United States of America, there was filed in said bankruptcy proceeding on March 4, 1935 a claim by the United States of America, through Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington for \$9387.21, plus interest of 1% per month from March 1, 1935 to date paid, covering taxes claimed against The Coast Wineries,

Inc., for the years 1934-1935 on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, a true and correct copy of which said claim, as filed with the Trustee in Bankruptcy, and with the Clerk of the United States District Court for the Eastern District of Washington, Southern Division, is attached hereto as "Exhibit A", and is by this reference thereto made a part hereof the same as though set forth in full herein, and which claim was thereafter, and on or about October 15, 1935, pursuant to a claim for abatement of said tax, filed [12] by the Trustee in Bankruptcy of The Coast Wineries, Inc., duly abated and said claim was withdrawn in said bankruptcy proceeding, in accordance with a letter from Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, addressed to the Clerk of the District Court for the Eastern District of Washington, dated October 15, 1935, a true and correct copy of which is attached hereto as "Exhibit B" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein.

III.

That thereafter, and on April 15, 1937, there was filed with the United States Clerk for the Eastern District of Washington, Southern Division, In the Matter of the Bankruptcy of Coast Wineries, Inc., being bankruptcy Cause Number B-1959, a

claim of the United States of America against The Coast Wineries, Inc. for the sum of \$3,162.56, plus interest at 1% for each full month from March 1, 1935 to August 30, 1935, and at one-half of 1% for each full month from August 30, 1935 to date paid, being a claim for the taxes on distilled spirits assessed against The Coast Wineries, Inc., under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, for the three months ending June 30, 1934, a true and correct copy of which said claim, as filed in said bankruptcy proceeding, is attached hereto as "Exhibit C" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein, the said claim covering the identical amount and taxes sought to be recovered by the plaintiff herein. [13]

IV.

That thereafter, said claim as mentioned in the preceding paragraph was disallowed and rejected by the Trustee in Bankruptcy of The Coast Wineries, Inc., and by the Special Master appointed by the United States District Court for the Eastern District of Washington, Southern Division, to hear matters in connection with said bankruptcy proceeding, and thereafter came on regularly for allowance, or disallowance, and for approval of the report of the Special Master, before the Honorable J. Stanley Webster, Judge of the United States Dis-

trict Court for the Eastern District of Washington, on the 5th day of October, 1937, the United States of America being duly represented by an Assistant United States Attorney at said hearing, and after a hearing thereon said claim was disallowed in full, and on the 12th day of November, 1937, an order was entered, duly denying and expunging said claim, a true and correct copy of which is attached hereto as "Exhibit D" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein; and that no appeal was thereafter taken from said order by the United States of America, and by reason thereof, and said proceeding as aforesaid, said adjudication and order are res adjudicata as to the claim of the plaintiff as asserted in this action against this answering defendant.

And by way of further answer to the plaintiff's Complaint, and as a second affirmative defense thereto and set-off, the defendant, the United States Fidelity and Guaranty Company, a corporation, alleges:

I.

That at the time of the adjudication in bankruptcy of The Coast Wineries, Inc. there were on hand, as an asset [14] of said The Coast Wineries, Inc. unused revenue stamps in the sum of \$737.22,

and that subsequent to the adjudication of the bankruptcy of The Coast Wineries, Inc. and the appointment and qualification of the Trustee in said bankruptcy, there was filed by said Trustee in Bankruptcy of The Coast Wineries, Inc., with the United States of America, a claim for refund and redemption of surplus Internal Revenue Stamps, which was thereafter allowed by the Comptroller General of the United States of America in the sum of \$732.22; and that subsequent to the allowance of said claim for refund, and with full knowledge of the claim asserted herein for taxes claimed to be due the United States of America from The Coast Wineries, Inc., said United States of America failed to apply said credit against said claimed taxes due from The Coast Wineries, Inc., but to the contrary paid said sum of \$732.22 to the Trustee in Bankruptcy of The Coast Wineries, Inc. by check on January 13, 1939.

Wherefore, having fully answered the Complaint of the plaintiff herein, the defendant, United States Fidelity and Guaranty Company, a corporation, respectfully prays that the Complaint of the plaintiff herein be dismissed as to it, with prejudice and with costs, in favor of this answering defendant; and in the alternative, and in the event only that it should be adjudged and determined that the United States Fidelity and Guaranty Company, a corporation, is indebted to the United States of America for any portion of the claimed taxes, as

sued upon herein, that a set-off be allowed against such claimed taxes in the sum of \$732.22, and that the Court may grant such [15] other and further relief in the premises as may seem just, equitable and proper.

ALLEN, FROUDE & HILEN
HUBBERT & MULLINS

Attorneys for Defendant,
United States Fidelity and
Guaranty Company, a cor-
poration.

State of Washington,
County of King—ss.

Gerald DeGarmo, being first duly sworn, on oath, deposes and says:

That he is an attorney at law and a member of the law firm of Allen, Froude & Hilen, and as such is one of the attorneys for the defendant, United States Fidelity and Guaranty Company, a corporation, and that he makes this verification for and on behalf of said defendant for the reason that said defendant is a foreign corporation and that it has no officer or agent within the State of Washington qualified to verify this Answer on its behalf, and that he is one of the attorneys as aforesaid; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

GERALD DeGARMO

Subscribed and sworn to before me this 9th day of October, 1940.

(Seal) G. M. HUTCHINSON

Notary Public in and for the State of Washington,
residing at Seattle.

Rec'd copy 12-9-40.

J. CHARLES DENNIS

U. S. Attorney. [16]

EXHIBIT "A"

STATEMENT OF CLAIM FOR TAXES DUE
THE UNITED STATES

In the District Court of the United States
for the Eastern District of Washington
Southern Division

In Bankruptcy No. B-1959

In the Matter of

COAST WINERIES, INC.

Debtor

Comes Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Coast Wineries, Inc. Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved.—Tax on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934.

Taxable Period.—1934-1935.

Amount of Tax.—\$9387.21.

Interest Provisions.—Plus interest of 1% per month from March 1, 1935 to date paid.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64(a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 28th day of February, 1935.

ALEX McK. VIERHUS

Collector of Internal Revenue
for the Collection District of
Washington

Sworn to and subscribed before me this 28th day
of February, 1935.

E. G. CLARKE

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in the U. S. District Court
Eastern Dist. of Washington March 4, 1935 A. A.
LaFramboise, Clerk Thomas Granger, Deputy. [17]

EXHIBIT "B"

Treasury Department
Internal Revenue Service
Tacoma, Wash.

Office of the Collector
District of Washington

October 15, 1935

In replying refer to
Clerk of the District Court for the
Eastern District of Washington
Spokane, Washington

Dear Sir:

In re: Coast Wineries, Inc.
Yakima, Washington
(Bankrupt)

Reference is made to our claim #2 filed under date of June 7, 1935 covering tax on distilled spirits due from the above named corporation in the amount of \$9387.21.

You are advised that upon the recommendation of the District Supervisor of the Alcohol Tax Unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims #1 and #3 covering capital stock taxes are still in effect.

Respectfully,

ALEX. McK. Vierhus,
Collector

By (signed) THOR W. HENRICKSEN

Assistant to the Collector

EB:MW

[Endorsed]: Filed in the U. S. District Court Eastern Dist. of Washington October 17, 1935 A. A. LaFranboise, Clerk Thomas Granger, Deputy No. 1959 Trustee's Exhibit J. Admitted Oct. 18, 1935.
[18]

EXHIBIT "C"

STATEMENT OF CLAIM FOR TAXES DUE
THE UNITED STATES

In the District Court of the United States for the
Eastern District of Washington, Southern Division.

In Bankruptcy No. B-1959

In the matter of

COAST WINERIES, Incorporated
Bankrupts,

Comes Thor W. Henricksen—Acting, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Coast Wineries, Incorporated Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved—Tax on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934.

Taxable Period—3 mo. ending 6/30/34.

Amount of Tax—\$3,162.56.

Interest Provisions—Plus interest at 1% for each full month from 3/1/35—8/30/35 and at $\frac{1}{2}$ of 1% for each full month from 8/30/35 to date paid.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64(a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 13 day of April 1937

(Signed) THOR W. HENRICKSEN

Acting Collector of Internal
Revenue for the Collection
District of Washington

Sworn to and subscribed before me this 13 day
of April 1937.

H. WOODWORTH

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in the U. S. District Court
Eastern Dist. of Washington April 15, 1937 A. A.
LaFramboise, Clerk Thomas Granger, Deputy. [19]

EXHIBIT "D"

In the District Court of the United States for the
Eastern District of Washington Southern Di-
vision.

No. B-1959

In the Matter of the Relief of
THE COAST WINERIES, INC.
a corporation,

Bankrupt.

ORDER.

The above matter coming on regularly for hear-
ing on the 5th day of October, 1937, on the claim
of the United States of America covering taxes

assessed under Section 3244 and 3126 of Revised Statutes and the Liquor Taxing Act of 1934 in the sum of \$3,162.56 plus interest, said claim having been filed by the acting collectors of Internal Revenue for the District of Washington as agent for the United States of America on or about April 13, 1937, at it appearing to the Court that the said claim of the United States was and is part of the original claim of \$9,387.21 which was filed by the collector of Internal Revenue for the District of Washington on or about February 28th, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the Special Master has disallowed and expunged said claim in his report, to which no exceptions were taken by the claimant, and which report to that extent has been approved by this Court in its Memo Decision on file herein.

Now, therefore, on oral motion of the trustee in bankruptcy it is,

Ordered, adjudged and decreed that the said claim of the United States in the sum of \$3,162.56, filed April 13, 1937, be and the same is hereby expunged and disallowed.

Dated this 12th day of November, 1937.

J. STANLEY WEBSTER

United States Judge for the
Eastern District of Wash-
ington.

To all of which order the United States of America, claimant, excepts, and said exception is hereby allowed.

J. STANLEY WEBSTER

United States Judge for the
Eastern District of Wash-
ington.

Approved as to form:

- S. R. CLEGG,
Asst. U. S. Atty.

Approved as to form:

CLARK & GRADY,
Attorneys for Trustee

[Endorsed]: Filed in the U. S. District Court
Eastern District of Washington Nov. 12, 1937 A. A.
LaFramboise, Clerk by Thomas Granger, Deputy.

[Endorsed]: Filed Oct. 9, 1940. Millard P.
Thomas, Clerk. By R. Elias, Deputy. [20]

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANT,
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, A CORPORATION.

Comes now the United States Fidelity and Guaranty Company, a corporation, one of the defendants in the above entitled action, and for this its Amended Answer to the Complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Admits each and every allegation of Paragraphs I and II of the plaintiff's Complaint, and the whole of said paragraphs.

II.

For answer to Paragraph III of the plaintiff's Complaint, admits that The Coast Wineries, Inc. was at one time a corporation organized and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at Yakima, Washington; and denies the remainder of said paragraph.

III.

For answer to Paragraph IV of the plaintiff's Complaint, admits that The Coast Wineries, Inc. was [21] engaged in the business of making and selling wines, and to secure the faithful compliance with all laws and regulations respecting the production, storage, sale and removal of all wines, and to secure the payment of all taxes due on said wines

at the time and in the manner required by said laws and regulations, the defendant, The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, on February 1, 1934 executed a bond in the sum of \$5,000.00, a true and correct copy of which is attached to the plaintiff's Complaint herein as "Exhibit A"; and on August 9, 1934 the defendant, The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, executed a bond in the sum of \$3,000.00, a true and correct copy of which is attached to the plaintiff's Complaint herein as "Exhibit B"; and except as herein specifically admitted, denies each and every other allegation in said paragraph contained.

IV.

For answer to Paragraph V of the plaintiff's Complaint, specifically denies that during the time said bonds were in full force and effect the defendant, The Coast Wineries, Inc., mixed a large quantity of wine with glycerine and/or other ingredients, or that a tax was incurred to the United States of America on such wines at the rate of 30¢ per gallon, or any sum whatsoever.

V.

For answer to Paragraph VI of the plaintiff's Complaint, denies that there was any levy or assessment by the Collector of Internal Revenue against The Coast [22] Wineries, Inc. of a tax for \$3,162.56,

at 30¢ per gallon on 10,541.88 proof gallons of wine, or at all; or that such an assessment was entered on the Collector's books D. S. 1935, February 1, Supple O/O.

VI.

For answer to Paragraph VII of said Complaint, admits that prior to the commencement of this action demand was made upon the United States Fidelity and Guaranty Company to pay the claimed taxes, as sued upon herein, and states that it does not have sufficient knowledge or information upon which to form a belief as to the truth or falsity of the other allegations of said paragraph and, therefore, denies the same.

VII.

For answer to Paragraph VIII of the plaintiff's Complaint, admits that this answering defendant, the United States Fidelity and Guaranty Company, a corporation, has refused and now refuses to pay the taxes as claimed by the plaintiff herein; and denies the other allegations in said paragraph contained not herein specifically admitted.

And by way of further answer to the plaintiff's Complaint, and as a first affirmative defense thereto, the United States Fidelity and Guaranty Company, a corporation, defendant herein, alleges:

I.

That subsequent to the execution by the defendant, United States Fidelity and Guaranty Company,

as surety, of the bonds, copies of which are attached to the plaintiff's Complaint, as "Exhibit A" and "Exhibit B", and subsequent to the claimed assessment by the Collector [23] of Internal Revenue of the taxes as claimed by Paragraph VI of the Complaint herein, said The Coast Wineries, Inc. was adjudicated a bankrupt in the United States District Court for the Eastern District of Washington, Southern Division, under Cause Number B-1959; and that subsequent to said adjudication in bankruptcy a trustee was appointed for said bankrupt corporation and sufficient funds and assets came into the hands of said Trustee in Bankruptcy, to pay and discharge all claims for taxes due, or asserted as being due, from said The Coast Wineries, Inc. to the United States of America.

II.

That pursuant to the direction of the Commissioner of Internal Revenue for the United States of America, there was filed in said bankruptcy proceeding on March 4, 1935 a claim by the United States of America, through Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington for \$9387.21, plus interest of 1% per month from March 1, 1935 to date paid, covering taxes claimed against The Coast Wineries, Inc., for the years 1934-1935 on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, a true and correct copy of which said claim, as filed

with the Trustee in Bankruptcy, and with the Clerk of the United States District Court for the Eastern District of Washington, Southern Division, is attached hereto as "Exhibit A", and is by this reference thereto made a part hereof the same as though set forth in full herein, and which claim was thereafter, and on or about October 15, 1935, pursuant to a claim for abatement of said tax, filed [24] by the Trustee in Bankruptcy of The Coast Wineries, Inc., duly abated and said claim was withdrawn in said bankruptcy proceeding, in accordance with a letter from Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, addressed to the Clerk of the District Court for the Eastern District of Washington, dated October 15, 1935, a true and correct copy of which is attached hereto as "Exhibit B" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein.

III.

That thereafter, and on April 15, 1937, there was filed with the United States Clerk for the Eastern District of Washington, Southern Division, In the Matter of the Bankruptcy of Coast Wineries, Inc., being Bankruptcy Cause Number B-1959, a claim of the United States of America against The Coast Wineries, Inc. for the sum of \$3,162.56, plus interest at 1% for each full month from March 1, 1935 to August 30, 1935, and at one-half of 1% for

each full month from August 30, 1935 to date paid, being a claim for the taxes on distilled spirits assessed against The Coast Wineries, Inc., under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, for the three months ending June 30, 1934, a true and correct copy of which said claim, as filed in said bankruptcy proceeding is attached hereto as "Exhibit C" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein, the said claim covering the identical amount and taxes sought to be recovered by the plaintiff herein. [25]

IV.

That thereafter, said claim as mentioned in the preceding paragraph was disallowed and rejected by the Trustee in Bankruptcy of The Coast Wineries, Inc., and by the Special Master appointed by the United States District Court for the Eastern District of Washington, Southern Division, to hear matters in connection with said bankruptcy proceeding, and thereafter came on regularly for allowance, or disallowance, and for approval of the report of the Special Master, before the Honorable J. Stanley Webster, Judge of the United States District Court for the Eastern District of Washington, on the 5th day of October, 1937, the United States of America being duly represented by an Assistant United States Attorney at said hearing,

and after a hearing thereon said claim was disallowed in full, and on the 12th day of November, 1937 an order was entered, duly denying and expunging said claim, a true and correct copy of which is attached hereto as "Exhibit D" and is by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein; and that no appeal was thereafter taken from said order by the United States of America, and by reason thereof, and said proceeding as aforesaid, said adjudication and order are res adjudicata as to the claim of the plaintiff as asserted in this action against this answering defendant.

And by way of further answer to the plaintiff's Complaint, and as a second affirmative defense thereto and set-off, the defendant, the United States Fidelity and Guaranty Company, a corporation, alleges:

I.

Defendant realleges and reavers each and every [26] allegation as contained in Paragraphs I and II of its first affirmative defense herein, and by this reference thereto incorporates said paragraphs, and the allegations thereof, into this paragraph of the second affirmative defense the same as though set forth in full herein.

II.

That in reliance upon the facts that the plaintiff had filed its claims, as aforesaid, in the bankruptcy

proceedings of The Coast Wineries, Inc., that sufficient funds and assets were in the hands of the Trustee in Bankruptcy of The Coast Wineries, Inc. to pay said claims in full, the notification of defendant by plaintiff of the intention of plaintiff to proceed against the bankrupt estate upon said claims to the extent of the assets available for the payment of said claims in the bankruptcy proceedings, and the subsequent abatement of said creditor's claim, as attached hereto as "Exhibit A", and of the tax therein sought to be recovered, the defendant, United States Fidelity and Guaranty Company, refrained from filing any claim for contingent liability in The Matter of the Bankruptcy of Coast Wineries, Inc., and refrained from prosecuting or filing any claim against the Estate of N. J. Dolph, one of the indemnitors upon the bonds sued upon herein within the time limited by law for the filing of claims of creditors, and thereby lost all right to participate either in the assets of the bankruptcy estate of The Coast Wineries, Inc., or of the Estate of N. J. Dolph, Deceased, as to any liability upon said bonds as sued upon by plaintiff herein, and by virtue of the facts aforesaid the bonds of defendant, United States Fidelity and Guaranty Company sued upon herein were cancelled and [27] terminated, and all liability of the defendant thereunder, for the claimed taxes sought to be collected herein, determined.

And by way of further answer to the plaintiff's Complaint, and as a third affirmative defense thereto and set-off, the defendant, the United States Fidelity and Guaranty Company, a corporation, alleges:

I.

That at the time of the adjudication in bankruptcy of The Coast Wineries, Inc. there were on hand, as an asset of said The Coast Wineries, Inc. unused revenue stamps in the sum of \$737.22, and that subsequent to the adjudication of the bankruptcy of The Coast Wineries, Inc. and the appointment and qualification of the Trustee in said bankruptcy, there was filed by said Trustee in Bankruptcy of The Coast Wineries, Inc., with the United States of America, a claim for refund and redemption of surplus Internal Revenue Stamps, which was thereafter allowed by the Comptroller General of the United States of America in the sum of \$732.22; and that subsequent to the allowance of said claim for refund, and with full knowledge of the claim asserted herein for taxes claimed to be due the United States of America from The Coast Wineries, Inc., said United States of America failed to apply said credit against said claimed taxes due from The Coast Wineries, Inc., but to the contrary paid said sum of \$732.22 to the Trustee in Bankruptcy of The Coast Wineries, Inc. by check on January 13, 1939.

Wherefore, having fully answered the Complaint of the plaintiff herein, the defendant, United States

Fidelity and Guaranty Company, a corporation, respectfully prays that the Complaint of the plaintiff herein be dismissed as to it, with prejudice and with costs, in favor [28] of this answering defendant; and in the alternative, and in the event only that it should be adjudged and determined that the United States Fidelity and Guaranty Company, a corporation, is indebted to the United States of America for any portion of the claimed taxes, as sued upon herein, that a set-off be allowed against such claimed taxes in the sum of \$732.22, and that the Court may grant such other and further relief in the premises as may seem just, equitable and proper.

ALLEN, FROUDE & HILEN
and

HUBBERT & MULLINS

By GERALD DeGARMO

Attorneys for Defendant,
United States Fidelity and
Guaranty Company, a corporation.

1308-1316 Northern Life Tower,
Seattle, Washington.

State of Washington,
County of King—ss.

Gerald DeGarmo, being first duly sworn, on oath, deposes and says:

That he is an attorney at law and a member of the law firm of Allen, Froude & Hilen, and as such

is one of the attorneys for the defendant, United States Fidelity and Guaranty Company, a corporation, and that he makes this verification for and on behalf of said defendant for the reason that said defendant is a foreign corporation, and that it has no officer or agent within the State of Washington qualified to verify this Amended Answer on its behalf, and that he is one of its attorneys as aforesaid; that he has read the foregoing Amended Answer, knows the contents thereof and believes the same to be true.

GERALD DeGARMO

Subscribed and sworn to before me this 3rd day of April, 1941.

(Seal)

G. M. HUTCHINSON

Notary Public in and for the State of Washington,
residing at Seattle.

Received a copy of the within Motion this 3d day of April, 1941.

J. CHARLES DENNIS,
Atty. for U. S. [29]

EXHIBIT "A"

STATEMENT OF CLAIM FOR TAXES DUE
THE UNITED STATES

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.

In Bankruptcy No. B-1959

In the matter of

COAST WINERIES, INC.,

Debtor.

Comes Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Coast Wineries, Inc. Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved.—Tax on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934.

Taxable Period.—1934-1935.

Amount of Tax.—\$9387.21.

Interest Provisions.—Plus interest of 1% per month from March 1, 1935, to date paid.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64 (a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 28th day of February, 1935.

ALEX McK. VIERHUS

Collector of Internal Revenue
for the Collection District of
Washington.

Sworn to and subscribed before me this 28th day of February, 1935.

E. G. CLARKE

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in the U. S. District Court,
Eastern Dist. of Washington, March 4, 1935. A. A.
LaFramboise, Clerk, Thomas Granger, Deputy.

EXHIBIT "B"

Treasury Department
Internal Revenue Service
Tacoma, Wash.

Office of the Collector
District of Washington

October 15, 1935

in replying refer to
Clerk of the District Court for the
Eastern District of Washington
Spokane, Washington

Dear Sir:

In re: Coast Wineries, Inc.
Yakima, Washington
(Bankrupt)

Reference is made to our claim #2 filed under date of June 7, 1935, covering tax on distilled spirits due from the above named corporation in the amount of \$9387.21.

You are advised that upon the recommendation of the District Supervisor of the Alcohol Tax Unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims #1 and #3 covering capital stock taxes are still in effect.

Respectfully,
ALEX McK. VIERHUS,
Collector.

(Signed) By THOR W. HENRICKSEN
Assistant to the Collector.

EB:MW

[Endorsed]: Filed in the U. S. District Court, Eastern Dist. of Washington, October 17, 1935. A. A. LaFramboise, Clerk. Thomas Granger, Deputy. No. 1959. Trustee's Exhibit J. Admitted Oct. 18, 1935. [31]

EXHIBIT "C"

STATEMENT OF CLAIM FOR TAXES DUE THE UNITED STATES

In the District Court of the United States for the
Eastern District of Washington, Southern Division.

In Bankruptcy—No. B1959

In the Matter of

COAST WINERIES, INCORPORATED,
Bankrupts.

Comes Thor W. Henricksen—Acting, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Coast Wineries, Incorporated Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved—Tax on distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934.

Taxable Period—3 mo. ending 6/30/34.

Amount of Tax—\$3,162.56.

Interest Provisions—Plus interest at 1% for each full month from 3/1/35-8/30/35 and at $\frac{1}{2}$ of 1% for each full month from 8/30/35 to date paid.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being *dully* determined by Section 3466 of the Revised Statutes and Section 64(a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 13th day of April, 1937.

(Signed)

THOR W. HENRICKSEN

Acting Collector of Internal
Revenue for the Collection
District of Washington.

Sworn to and subscribed before me this 13th day of April, 1937.

H. WOODWORTH

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in the U. S. District Court,
Eastern Dist. of Washington, April 15, 1937. A. A.
LaFramboise, Clerk. Thomas Granger, Deputy.

[32]

EXHIBIT "D"

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.

No. B-1959

In the Matter of the Relief of
THE COAST WINERIES, INC.,
a corporation,

Bankrupt.

ORDER

The above matter coming on regularly for hear-
ing on the 5th day of October, 1937, on the claim
of the United States of America covering taxes as-
sessed under Section 3244 and 3126 of Revised
Statutes and the Liquor Taxing Act of 1934 in the
sum of \$3,162.56 plus interest, said claim having
been filed by the acting collectors of Internal Reve-

nue for the District of Washington as agent for the United States of America on or about April 13, 1937, at it appearing to the Court that the said claim of the United States was and is part of the original claim of \$9,387.21 which was filed by the collector of Internal Revenue for the District of Washington on or about February 28th, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the Special Master has disallowed and expunged said claim in his report, to which no exceptions were taken by the claimant, and which report to that extent has been approved by this Court in its Memo Decision on file herein.

Now, Therefore, on oral motion of the trustee in bankruptcy it is,

Ordered, adjudged and decreed that the said claim of the United States in the sum of \$3,162.56, filed April 13, 1937, be and the same is hereby expunged and disallowed.

Dated this 12th day of November, 1937.

J. STANLEY WEBSTER

United States Judge for the
Eastern District of
Washington.

To all of which order the United States of America, claimant, excepts, and said exception is hereby allowed.

J. STANLEY WEBSTER

United States Judge for the
Eastern District of
Washington.

Approved as to form:

S. R. CLEGG

Assist. U. S. Atty.

Approved as to form:

CLARK & GRADY

Attorneys for Trustee

[Endorsed]: Filed in the U. S. District Court,
Eastern District of Washington, Nov. 12, 1937. A.
A. LaFramboise, Clerk, by Thomas Granger,
Deputy.

[Endorsed]: Filed Apr. 7, 1941. [33]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff by and through J. Charles Dennis, United States Attorney for the Western District of Washington, Northern Division, its attorney, and in reply to the amended answer, affirmative defenses and setoff of the defendant, United States Fidelity & Guaranty Company, alleges:

I.

The alleged amended answer does not state a valid defense to the plaintiff's action upon the bonds herein sued upon.

II.

The alleged first affirmative defense does not state a valid defense to the plaintiff's action on the bonds herein sued upon.

III.

(1) Replying to Paragraph I of the alleged affirmative defense, plaintiff admits the allegations therein contained except plaintiff denies that sufficient funds and assets came into the hands of said trustee in bankruptcy to pay and discharge all claims for taxes due or asserted as being due from the said Coast Wineries, Inc., to the United States of America. [34]

(2) Replying to Paragraph II of the alleged first affirmative defense, plaintiff admits the allegations therein contained except defendant denies that the said proof of claim was filed with the trustee in bankruptcy but alleges it was filed with the Clerk of the United States District Court in a debtor reorganization proceedings under Section 77B of the Bankruptcy Act as amended. Plaintiff also denies that said claim was duly abated or that it was withdrawn pursuant to a claim for abatement having been filed by the trustee for the bankrupt.

(3) Replying to Paragraph III of the alleged first affirmative defense, plaintiff admits that there

was forwarded to the Clerk of the United States District Court and to the trustee in bankruptcy of the Coast Wineries, Inc., for filing the claim referred to therein and that the amount sought to be recovered in this action on the bonds is the identical amount of taxes set forth therein but plaintiff denies each and every other allegation therein contained.

(4) Referring to Paragraph IV of the alleged first affirmative defense, plaintiff denies that the claim mentioned in Paragraph III of said alleged affirmative defense was disallowed and rejected by the trustee in bankruptcy of the Coast Wineries, Inc. and by the Special Master, appointed by the United States District Court or that it thereafter came on regularly for allowance or disallowance on the 5th day of October, 1937, except that on said date upon the oral objection of the trustee to the filing of said claim on the ground that it had been withdrawn, the United States District Court, on November 12, 1937, entered the order attached to defendant's answer as Exhibit "D". Further replying to said paragraph, plaintiff [35] denies each and every other allegation therein contained.

IV.

The alleged second affirmative defense does not state a valid defense to the plaintiff's action on the bonds herein sued upon.

V.

(1) Replying to Paragraph I of defendant's second cause of action, plaintiff refers to Paragraph

III (1) and (2) of its above reply to defendant's alleged first affirmative defense and by this reference incorporates the same as if set out *hoc verba*.

(2) Plaintiff denies the allegations contained in Paragraph II of defendants alleged second cause of action except as herein admitted.

VI.

The alleged third affirmative defense does not state a valid defense to the plaintiff's action on the bonds herein sued upon or a valid setoff thereto.

VII.

Replying to Paragraph I of defendant's alleged third affirmative defense and setoff, plaintiff denies that at the time of the adjudication in bankruptcy of the Coast Wineries, Inc., there were on hand as an asset of said Coast Wineries, Inc., unused revenue stamps in the sum of \$737.22 but alleges that on September 14, 1935, the United States District Court in the bankruptcy proceedings of the Coast Wineries, Inc., entered an order providing in part as follows:

"It Is Further Adjudged and Decreed that the United States Government shall forthwith cause said wine to be inventoried and gauged and the amount of the normal gallonage or withdrawal tax ascertained as provided in Sections 442 and 450, as amended, U. S. C. A., [36] and the Yakima Valley Bank and Trust Company, as trustee, shall out of the funds hereto-

fore paid to it by R. D. Rovig purchase from the Collector of Internal Revenue the stamps required by said Sections and affix them to the containers as provided by law.”

That pursuant to said order, the trustee of the Coast Wineries, Inc., purchased stamps believed necessary to pay the normal gallonage or withdrawal tax as therein provided but that after the cancellation thereof the said trustee had on hand unused stamps in the sum of \$737.22 which were returned to the Collector of Internal Revenue for redemption under the Act of May 12, 1900, as amended (Title 25 U. S. C. A. 1424) and under the regulations promulgated by the Commissioner of Internal Revenue a claim was filed and redemption under said act authorized and paid.

Defendant denies each and every other allegation in said paragraph not herein admitted.

Wherefore, plaintiff having fully replied to defendant's alleged amended answer, first, second and third affirmative defenses and setoff, prays that these alleged defenses be stricken and denied and that it have judgment as prayed in its complaint.

J. CHARLES DENNIS

United States Attorney.

GERALD SHUCKLIN

Assistant United States
Attorney.

THOMAS R. WINTER

Special Attorney, Bureau of In-
ternal Revenue.

Copy of the within received 4/29/41.

ALLEN FROUDE & HILEN

Attorneys for Dft. U. S. F. & G.
Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, May 1, 1941. Millard P. Thomas, Clerk, by C. R. Fitzgerald, Deputy. [37]

[Title of District Court and Cause.]

DECISION

J. Chas. Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney, for plaintiff. Thomas R. Winters, Special Attorney, Bureau of Internal Revenue. Allen, Froude & Hilen, and Hubbert & Millins, attorneys for the defendant.

Neterer, District Judge.

The corporate sovereignty of the plaintiff, and the corporate entity of the United States Fidelity and Guaranty Company, under the laws of the State of Maryland, and of the Coast Wineries, Inc., under the laws of the State of Washington are admitted. It is also admitted that the Coast Wineries, Inc., has engaged in the business of making and selling wines; that the United States Fidelity & Guaranty Company executed a bond to assure the faithful compliance with the laws of the United States by

the Coast Wineries, Inc.; that the Coast Wineries, Inc., was adjudicated, bankrupt June 16, 1935; that the Yakima Valley Bank and Trust Company was appointed Trustee, and was authorized to, and did employ, W. B. Clark and T. E. Grady its attorneys; that the substantial asset at the time of adjudication was a quantity of wine, the production and rectification of which is the basis of the Government's claim for which claim for tax on distilled spirits, assessed under Sec's 3244 and 3176 R. S.; and under liquor taxing act of 1934, was filed. This wine was by the court ordered sold by the Trustee for which \$12,500.00 was received. After sale the District Judge concluded that the wine should be delivered to the purchaser free and clear of tax, and directed the trustee to purchase, and affix to the containers, the necessary revenue stamps.

In addition to the claim in suit there were two other claims filed; one for \$76.20 assessed for documentary stamp tax under Tit. 5 part 3 of the Revenue Act of 1932, and one claim for \$501.67 as a capital stock assessment under Sec. 215 of the National Industrial Recovery Act. Objection was made to evidence of these claims at trial, and the ruling was reserved. The objection is overruled.

The plaintiff contends that testimony on these items is immaterial; the defendant contends that these items form the basis of a settlement and compromise of the issue before the court. That the Trustee had objected to these two items and upon

the statement of the attorney for plaintiff that an allow- [38] ance of these claims, the claim in issue would be abated. I am convinced there was conversation, and agreement between the attorney for the plaintiff and the attorney for the defendant which resulted in the withdrawal of the claim in suit, the withdrawal reads "reference is made to our claim #2 filed under date of June 7, 1935, covering tax on distilled spirits due from above named corporation in the amount of \$9,387.21.

"You are advised that upon the recommendation of the District Supervisor of the alcoholic unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims #1 and #3 covering capital stock tax are still in effect."

The withdrawn claim #2 includes the claim in suit \$3,162.56; claims #1 and #3 cover the items for capital stock tax. The defendant contends that it was agreed by the plaintiff's representatives that the claim in suit would be abated if the other two claims were paid, thereupon Judge Grady, attorney for the Trustee, recommended to the Special Master that these two claims be paid. The claims were thereupon allowed by the Special Master. Upon report to the United States District Judge and after formal hearing, these two claims were allowed and the \$3,162.56 was denied by Judge Webster. The order entered by Judge Webster on the 12th day of November, 1937, reads as follows:

“The above matter coming on regularly for hearing on the 5th day of October, 1937, on the claim of the United States of America covering taxes assessed under Sections 3244 and 3176 of Revised Statutes and the Liquor Taxing Act of 1934 in the sum of \$3,162.56 plus interest; said claim having been filed by the Acting Collector of Internal Revenue for the District of Washington as agent for the United States of America on or about April 13, 1937, and it appearing to the court that the said claim of the United States was and is a part of the original claim of \$9,387.21 which was filed by the Collector of Internal Revenue for the District of Washington on or about February 28, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the said Special Master has disallowed and expunged said claim in his report, to which the exceptions were taken by the claimant, and which report to that extent has been approved by this court in its memorandum decision on file herein.

Now Therefore, on oral motion of the Trustee in bankruptcy, it is

Ordered, Adjudged and Decreed That the said claim of the United States in the sum of

\$3,162.56 filed on April 13, 1937, be, and the same is hereby expunged and disallowed.

Dated this 12th day of November, 1937.

J. STANLEY WEBSTER,

United States Judge for the
Eastern District of Wash-
ington.

To all of which order the United States of America, claimant except, and said exception is hereby allowed.

J. STANLEY WEBSTER,

United States Judge for the
Eastern District of Wash-
ington.

Approved as to form:

S. R. CLEGG

Asst. U. S. Attorney

Approved as to form:

CLARK & GRADY

Attorneys for Trustee." [39]

"The order * * * was a final order binding as between the parties. There can be no question but that the jurisdiction of the bankruptcy court was properly exercised * * *." So said the Supreme court in *Sampsell v. Imperial Paper & Col. Corporation* in opinion filed April 28, 1941. (not reported) Commenting on a like order the Court further said "There was no appeal from the order entered * * *. It therefore could not be collaterally

attacked * * * .” A like status as here, the Supreme Court added “The power of the bankruptcy court * * * is complete.

This expression from the Supreme Court fixed the status of Judge Webster’s order.

The conclusion is inevitable that the issue is res adjudicata. The fact and right was directly in issue, and specifically determined by Judge Webster, who had jurisdiction of the subject matter, and of the parties, and the issue may not again be disputed in this case by the parties, or their privies. The question of res adjudicata was exhaustively discussed by the writer sitting in the Circuit Court of Appeals with Judge Gilbert and Judge Rudkin in U. S. vs. Sakharan Ganesh Pandit 15 Fed. (2d) 285. The opinion was unanimous. Certiorari was denied by the Supreme Court 273 U. S. 759. What is said in the “Pandit” case is applicable and decisive here.

The instant issue is distinguished from the Royal Indemnity Co. vs. U. S. decided by the Supreme Court May 26, 1941, in that the issue was the effect of a “*full payment of the tax and liability on the bond*”. (Italics supplied) and surrendered the bond, before its “obligation was fully satisfied”. In this case the Indemnity Company was bound to know the power of the agent (The Collector) and with this knowledge could not assert estoppel. In the instant case we have an adjudication of the claim by a court of competent jurisdiction, all

parties being before the court on formal hearing, exception to the judgment was noted, but no appeal was prosecuted. The same question was discussed in the Pandit case supra (15 Fed. (2d) 285) and upon that case and authorities there cited the plaintiff, here, must fail. The judgment of Judge Webster is final, even if erroneous, not having been appealed from, is *res adjudicata*.

The claim against the Wineries Company Inc. being disposed of the Surety is released. The bond is ancillary to the tax debt, and does not survive it.

The condition of the bond follows:

“Whereas the above-bounded principal is engaged * * * in business of making and selling domestic wines * * * in the Collection District of Washington.

Now Therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the U. S. and regulations issued in pursuance thereof respecting the PRODUCTION, storage, sale, or removal, and accounting of all wines produced, or received by him, and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; * * *

The bond was executed August 9, 1934, prior to the tax assessment.

This is not a bond to stay execution as in *U. S. vs. John Barth Co.* 279 U. S. 370 or to postpone payment of the tax as in *Grays Motor Co. vs. U. S.* 16 Fed. (2d) 367 or to refrain from collection at the time *Hughson vs. U. S.* 59 Fed. (2d) 17. [40]

Without discussing the question of estoppel, I will say, that I think, upon the record the plaintiff likewise is estopped from asserting its claim in suit.

Judgment for the defendant.

JEREMIAH NETERER,

United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 14, 1941. Millard P. Thomas, Clerk, By C. R. Fitzgerald, Deputy. [41]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This Cause having come on regularly for trial, before the undersigned Judge of the above entitled Court, on the 7th day of May, 1941, upon the Complaint of the plaintiff, the Amended Answer and Affirmative Defenses of the defendant, United States Fidelity and Guaranty Company, a corporation, and the Reply of the plaintiff thereto; and the plaintiff having appeared and having been represented by J. Charles Dennis, United States At-

torney, Gerald Shucklin, Assistant United States Attorney, and Thomas R. Winter, Special Attorney for the Bureau of Internal Revenue; and the defendant, United States Fidelity and Guaranty Company, having appeared and having been represented by Allen, Froude & Hilen and Hubbert & Mullins, its attorneys; and witnesses having been sworn and having testified on behalf of plaintiff and defendant, United States Fidelity and Guaranty Company, and exhibits having been introduced in evidence, and at the close of the trial the cause having been taken under advisement for the submission of briefs upon the facts, and such briefs having been submitted, and the Court on the 14th day of June, 1941 having filed its written decision herein; and the Court being fully advised now makes the following: [42]

FINDINGS OF FACT

I.

That the United States of America, plaintiff herein, was at all times herein mentioned and now is a corporation sovereign.

II.

That at all times herein mentioned the defendant, United States Fidelity and Guaranty Company, was and it now is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, having its principal office at Baltimore, Maryland, and duly authorized to do

business, and doing a general suretyship business, in the State of Washington.

III.

That for a number of years prior to 1937, and in particular during the years 1934 and 1935, The Coast Wineries, Inc., was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at Yakima, Washington.

IV.

That The Coast Wineries, Inc., was engaged in the business of making and selling wines, and to secure the faithful compliance with all laws and regulations respecting the production, storage, sale and removal of all wines, and to secure the payment of all taxes due on said wines at the time and in the manner required by said laws and regulations, the defendant, The Coast Wineries, Inc., as principal, and the defendant, United States Fidelity and Guaranty Company, a corporation, as surety, on February 1, 1934 executed a bond in the sum of \$5,000.00, a true and correct copy of which is attached to the plaintiff's complaint herein as "Exhibit A"; [43] and on August 9, 1934, the defendant, The Coast Wineries, Inc., as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety, executed a bond in the sum of \$3,000.00, a true and correct copy of which is attached to the plaintiff's complaint herein as "Ex-

hibit B"; and the obligations of which bonds were identical and as follows:

"Now, therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the United States and regulations issued in pursuance thereof respecting the production, storage, sale, or removal, and the accounting of all wines produced or received by him, or which now remain on said premises; and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; otherwise to remain in full force and effect."

V.

That during the time the said bonds were in full force and effect, The Coast Wineries, Inc. mixed a quantity of wine with glycerine and other ingredients, by reason of which the Commissioner of Internal Revenue levied and assessed against The Coast Wineries, Inc. a tax for \$3,162.56, at 30¢ per gallon on 10,541.88 proof gallons, said assessment being entered on the Collector's book D. S. 1935, February 1, Supple 0/0.

VI.

That in February of 1935 The Coast Wineries, Inc. filed a Petition for corporate reorganization in the United States District Court for the Eastern

District of Washington, Southern Division, under Cause Number B-1959; and on February 27, 1935 the plaintiff herein, pursuant to the direction of the Commissioner of Internal Revenue, and acting through Alex McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, filed a Claim in [44] said proceedings for certain taxes, in the sum of \$501.67, plus interest of one (1%) per cent for each full month beginning September 9, 1934, covering capital stock tax assessed under Section 215 of the National Industrial Recovery Act for the fiscal year 1934; on March 4, 1935, filed a Claim in said proceedings for certain taxes, in the sum of \$9,387.21, plus interest of one (1%) per cent per month from March 1, 1935 to date paid (which Claim included the taxes assessed as mentioned in the preceding paragraph hereof, and which taxes are those sought to be recovered in this action), said taxes being claimed for the taxable years 1934 and 1935 as assessed on distilled spirits under Sections 3244 and 3176 of the Revised Statutes and under the Liquor Taxing Act of 1934, and a copy of which said Claim was introduced in evidence herein as defendant's "Exhibit A-1"; and on June 10, 1935 filed a Claim in said proceedings for certain taxes, in the sum of \$76.20, plus interest at the rate of one (1%) per cent per month beginning ten (10) days after the date of first demand notice, as a proposed assessment for the taxable years 1934 and 1935 of documentary stamp tax under Title V, Part III, Revenue Act of 1932, and a copy of which

said Claim was introduced in evidence herein as defendant's "Exhibit A-3".

VII.

That on June 16, 1935 The Coast Wineries, Inc., was duly adjudicated a bankrupt, and the Yakima Valley Bank and Trust Company was appointed as Trustee in Bankruptcy, and was authorized to and did employ W. B. Clark and T. E. Grady of Yakima, Washington, as its attorneys.

VIII.

That the only substantial asset of The Coast Wineries, Inc. was a quantity of wine, the production and rectification of which was the basis of the claim for taxes asserted [45] in this action, and as filed in the Bankruptcy of The Coast Wineries, Inc. as a part of its claim for \$9,387.21, and said wine was ordered sold by the Trustee in Bankruptcy of The Coast Wineries, Inc. for the sum of \$12,500.00. That subsequent to said sale the District Judge having charge of said Bankruptcy proceedings concluded that said wine should be delivered to the purchaser free and clear of tax, and directed the Trustee to purchase and affix to the containers the necessary Revenue Stamps, and pursuant to such direction the Trustee did purchase from the proceeds of the sale of said wine Internal Revenue Stamps, in the total sum of \$9,171.62, and did affix same to said containers.

IX.

That subsequent to the appointment and qualification of a Trustee in the Matter of the Bankruptcy of The Coast Wineries, Inc., said Trustee filed Objections to the three (3) Claims of the United States of America, as mentioned in Paragraph VI hereof, and thereafter said Objections came on for hearing before the Special Master, in the Matter of the Bankruptcy of The Coast Wineries, Inc., and pursuant to an agreement between the attorney for the plaintiff herein and the attorneys for the Trustee in Bankruptcy of The Coast Wineries, Inc., by which the Trustee withdrew its objections to the claims of the plaintiff for \$501.67 and \$76.20, respectively, as mentioned in Paragraph VI hereof, the Claim of the plaintiff for \$9,387.21 (which Claim included the tax claim sued upon herein) was withdrawn and written notice of such withdrawal given by the Collector of Internal Revenue for the Collection District of Washington to the Clerk of the District Court for the Eastern District of Washington, at Spokane, Washington, under date of October 15, 1935, filed in the Bankruptcy Proceedings of The Coast Wineries, Inc. on October 17, 1935, reading as follows: [46]

“Reference is made to our claim #2 filed under date of June 7, 1935 covering tax on distilled spirits due from the above named corporation in the amount of \$9387.21.

You are advised that upon the recommendation of the District Supervisor of the Alcohol

Tax Unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims #1 and #3 covering capital stock taxes are still in effect.”

and pursuant to such agreement and withdrawal the Special Master made his report to the District Judge, as follows:

“Claim No. Sixty-nine (69) filed by the United States Collector of Internal Revenue in the amount of Nine Thousand Three Hundred eighty-seven and 21/100 (\$9,387.21) Dollars has been withdrawn (Trustee’s Exhibit J).

This claim represented a tax on distilled spirits assessed under Sections 3244 and 3176 of the Revised Statutes and under the Liquor Taxing Act of 1934. The tax was abated under date of October 15, 1935.

“Claim No. Forty-six (46) in the amount of Seventy-six and 20/100 (\$76.20) Dollars was filed by the United States Collector of Internal Revenue as a proposed assessment of documentary stamp tax under Title 5; Part 3 of the Revenue Act of 1932. The certificates of stock upon which the stamp tax is claimed were issued by the corporation, and the tax thereon became due and payable. The trustee’s objection to this claim was withdrawn (Tr. Vol. I. p. 174).

“Claim No. Thirty-one (31) in the amount of Five Hundred One and 67/100 (\$501.67) Dollars was filed by the United States Col-

lector of Internal Revenue as a capital stock tax assessed under section 215 of the National Industrial Recovery Act. The Trustee's objection to this claim was withdrawn. (Tr. Vol. I, p. 174)."

and on December 21, 1936 the District Judge, J. Stanley Webster, confirmed said report of the Special Master by Memorandum Opinion.

X.

That thereafter, on April 15, 1937, the United States of America filed in the Matter of the Bankruptcy of The Coast Wineries, Inc., a claim in the sum of \$3,162.56, plus interest at one (1%) per cent for each full month from [47] March 1, 1935 to August 30, 1935, and one-half of one ($\frac{1}{2}$ 1%) per cent for each full month from August 30, 1935, to date paid, representing taxes claimed for the three months' period ending June 30, 1934, upon distilled spirits assessed under Sections 3244 and 3176 of Revised Statutes and under the Liquor Taxing Act of 1934, said Claim being for a portion of the taxes covered by the previous Creditor's Claim of \$9,387.21 which had been withdrawn under the circumstances and pursuant to the agreement mentioned in the preceding paragraph hereof, and being the tax claim asserted in this action; and upon the objections of the Trustee in Bankruptcy of The Coast Wineries, Inc. to such claim, filed on April 15, 1937, said claim came on for hearing before the Honorable J. Stanley Webster, one of

the Judges of the United States District Court for the Eastern District of Washington, Southern Division, on October 5, 1937, and resulted in the entry of an Order on November 12, 1937, reading as follows:

“The above matter coming on regularly for hearing on the 5th day of October, 1937, on the claim of the United States of America covering taxes assessed under Section 3244 and 3126 of Revised Statutes and the Liquor Taxing Act of 1934 in the sum of \$3,162.56 plus interest, said claim having been filed by the acting collectors of Internal Revenue for the District of Washington as agent for the United States of America on or about April 13, 1937, and it appearing to the Court that the said claim of the United States was and is part of the original claim of \$9,387.21 which was filed by the Collector of Internal Revenue for the District of Washington on or about February 28th, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the Special Master has disallowed and expunged said claim in his report, to which no exceptions were taken by the claimant, and which report to that extent has been approved by this Court in its Memo Decision on file herein.

“Now, Therefore, on oral motion of the trustee in bankruptcy, it is,

“Ordered, adjudged and decreed that the said claim of the United States in the sum of \$3,162.56, filed April 13, 1937, be and the same is hereby expunged and disallowed. [48]

“Dated this 12th day of November, 1937.

J. STANLEY WEBSTER,

United States Judge for the
Eastern District of Wash-
ington.

“To all of which order the United States of America, Claimant, excepts, and said exception is hereby allowed.

J STANLEY WEBSTER,

United States Judge for the
Eastern District of Wash-
ington.

Approved As To Form:

S. R. CLEGG,

Asst. U. S. Atty.

Approved As To Form:

CLARK & GRADY,

Attorneys for Trustee”

from which order no review or appeal was taken.

XI.

That on June 6, 1935 the plaintiff gave written notice to The Coast Wineries, Inc., and to the defendant, United States Fidelity and Guaranty Company of possible liability upon the bonds sued upon

herein, and in accordance therewith the defendant, United States Fidelity and Guaranty Company, gave similar written notice to the indemnitors upon its bonds, namely, N. J. Dolph, W. A. Hubbert and Maude Hubbert, his wife, and one McKenzie, but that thereafter, in reliance upon assurances given its Seattle Claim Superintendent, A. W. Murray, by representatives of the Alcohol Tax Unit in Seattle, Washington, that the taxes claimed by the plaintiff for which the defendant, United States Fidelity and Guaranty Company, might be liable upon its bonds had been abated and withdrawn; and upon the record in the Bankruptcy Proceedings of The Coast Wineries, Inc., showing the withdrawal of said tax claims, the defendant, United States Fidelity and Guaranty Company, refrained from filing a Creditor's Claim within the time allowed by law in the Estate of N. J. Dolph, Deceased, who died subsequent to the adjudication in bankruptcy of The Coast Wineries, Inc., and which said N. J. Dolph left a substantial estate from which such a claim could have been paid. Exception to plaintiff is allowed.

Done in Open Court this 7th day of July, 1941.

JEREMIAH NETERER,

United States District Judge.

[49]

And from the above and foregoing Findings of Fact the Court deduces the following:

CONCLUSIONS OF LAW.

I.

That the proceedings in the Matter of the Bankruptcy of The Coast Wineries, Inc., in Cause Number B-1959, in the District Court of the United States for the Eastern District of Washington, Southern Division, and in particular the Order of Judge J. Stanley Webster of November 12, 1937, are res judicata between plaintiff and defendant, United States Fidelity and Guaranty Company, upon the issues presented by this suit, and the action of the plaintiff to recover from the defendant, United States Fidelity and Guaranty Company, upon the tax claim asserted herein, is barred by the former adjudication, expunging and disallowing said claim.

II.

That the plaintiff is estopped to assert the claim sued upon herein as against the defendant, United States Fidelity and Guaranty Company.

III.

That this action should be dismissed with prejudice. Exception to plaintiff allowed.

Done in Open Court This 7th day of July, 1941.

JEREMIAH NETERER,

United States District Judge.

Prepared and presented by

ALLEN, FROUDE & HILEN &
HUBBERT & MULLINS,

Attys for Deft U S F & G Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 7, 1941. Millard P. Thomas, Clerk, By Truman Egger, Deputy. [50]

In the United States District Court for the
Western District of Washington,
Northern Division
No. 136.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

THE COAST WINERIES, INC., a corporation,
and UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation,
Defendants.

JUDGMENT.

This Cause having come regularly on for trial, before the undersigned Judge of the above entitled Court, on the 7th day of May, 1941, upon the Complaint of the plaintiff, the Amended Answer and Affirmative Defenses of the defendant, United States Fidelity and Guaranty Company, a corporation, and the Reply of the plaintiff thereto; and the plaintiff having appeared and having been represented by its attorneys, J. Charles Dennis, United States Attorney, Gerald Shucklin, Assistant United States Attorney, and Thomas R. Winter, Special

Attorney for the Bureau of Internal Revenue; and the defendant, United States Fidelity and Guaranty Company, having appeared and having been represented by Allen, Froude & Hilen and Hubbert & Mullins, its attorneys; and witnesses having been sworn and having testified on behalf of plaintiff and defendant, United States Fidelity and Guaranty Company, and exhibits having been introduced in evidence, and at the close of the trial the cause having been taken under advisement for the submission of briefs upon the facts, and such briefs having been submitted, and the Court on the 14th day of June, 1941 having filed its written decision herein; and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises: [51]

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the above and entitled action be, and the same is hereby, dismissed with prejudice.

Exception to plaintiff allowed.

Done in Open Court This 7th day of July, 1941.

JEREMIAH NETERER,

United States District Judge.

Prepared and presented by

ALLEN, FROUDE & HILEN

HUBBERT & MULLINS,

Attys for Deft U.S.F.&G. Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 7, 1941. Millard P. Thomas, Clerk, By Truman Egger, Deputy. [52]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 7th day of July, 1941.

J. CHARLES DENNIS

United States Attorney for
the District of Washington.

GERALD SHUCKLIN

Assistant United States Attorney
for the District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 6, 1941. Millard P. Thomas, Clerk,
By J. M. A., Deputy. [53]

In the United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

THE COAST WINERIES, INC., a corporation,
and the UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation,
Appellee.

MOTION FOR EXTENSION OF TIME TO
FILE TRANSCRIPT OF RECORD AND
DOCKET CAUSE.

Comes now J. Charles Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney for the District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, counsel for the appellant, and upon the affidavit hereto attached, move the Court for an order extending the time to file transcript of record and docket the above cause in the above-entitled Court to and including the 23rd day of February, 1942.

J. CHARLES DENNIS

United States Attorney

GERALD SHUCKLIN

Assistant United States Attorney

THOMAS R. WINTER

Special Ass't. to the Chief
Counsel

So Ordered:

CURTIS D. WILBUR

Senior United States

Circuit Judge

[Endorsed]: Order, Filed January 27, 1942. Paul P. O'Brien, Clerk. [54]

State of Washington

County of King—ss.

I, Thomas R. Winter, being first duly sworn on oath, deposes and says: That I am the Special Assistant to the Chief Counsel of the Bureau of Internal Revenue and as such assist the United States Attorney for the Western District of Washington in the trial of tax cases by or against the United States; that as such I actively assisted the United States in the trial of this case; that on October 4, 1941, the Attorney General's Office advised the United States Attorney that the Solicitor General had authorized an appeal in the above case, which letter was forwarded to my office and a notice of appeal was duly served and filed on October 6, 1941; that the United States Attorney was further requested to perfect the appeal and proceed with the printing of the record; that on account of additional duties due to the national emergency and through a misunderstanding between the United States Attorney's office and my office, the matter of filing the transcript of the record and docketing the case on appeal was not attended to within the

prescribed time; that affiant believes that the Government's counsel should be excused from this neglect and states that the failure to file the transcript of the record and docket the cause heretofore has not in any manner prejudiced the right of the appellee.

.....

Subscribed and sworn to before me this day
of, 1942.

.....

My commission expires:

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 4, 1942. Millard P. Thomas, Clerk, By C. R. Fitzgerald, Deputy. [55]

—————

[Title of District Court and Cause.]

ORDER

Upon motion of the United States of America, by Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, one of its attorneys, and good cause being shown therefor, and it appearing necessary to transmit the original exhibits in the above case to the Circuit Court of Appeals, it is hereby

Ordered that the original exhibits in the above case be transmitted to the Circuit Court of Ap-

peals for the Ninth Circuit on the appeal of the above case.

Dated this 5th day of February, 1942.

LLOYD L. BLACK

Judge

Presented by:

THOMAS R. WINTER

Approved:

ALLEN, HILEN, FROUDE & HILEN

By GERALD DE GARMO

Attorneys for United States Fidelity
and Guaranty Company.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 5, 1942. Millard P. Thomas, Clerk, By C. R. Fitzgerald, Deputy. [56]

[Title of District Court and Cause.]

DESIGNATION OF CONTEXT OF RECORD
ON APPEAL

To the Clerk of the Above-Entitled Court:

Please prepare and certify the complete record and all the evidence in the above action, including the complete transcript of testimony taken at the trial and all original exhibits which are designated as follows:

1. Complaint
2. Answer

3. Amended Answer
4. Plaintiff's Reply to Amended Answer
5. Memorandum Decision
6. Findings of Fact and Conclusions of Law
7. Judgment
8. Notice of Appeal
9. Motion and Order Extending Time to File
and Docket Record on Appeal
10. All original exhibits
11. Transcript of testimony taken at trial
12. Order transmitting original exhibits
13. This Designation.

Copy of the within received 2/4/42

ALLEN, HILEN, FROUDE
& DeGARMO

Attorneys for Appellee

Dated this 4th day of February, 1942.

J. CHARLES DENNIS

United States Attorney

GERALD SHUCKLIN

Assistant United States
Attorney

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division, Feb. 5, 1942. Millard P. Thomas, Clerk,
By C. R. Fitzgerald, Deputy. [57]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
Western District of Wash.—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 57, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, except as to the Reporter's transcript of testimony, the original of which is enclosed herewith as part of the record on appeal in this cause, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit *Court of Appeals for the Ninth Circuit*.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the Plaintiff and Appellant for making record, cer-

[58]

tificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 153 folios at 05¢ (copies furnished).....	\$ 7.65
Appeal Fee (Sec. 5 of Act).....	5.00
Certificate of Clerk to Transcript of Record50
Certificate of Clerk to Original Exhibits50
<hr/>	
Total.....	\$13.65

I further certify that the foregoing fee in the amount of \$13.65 has not been paid for the reason that the Government is the Appellant.

I further certify that the original reporter's transcript of proceedings filed on Feb. 16, 1942 is also being forwarded as a part of the record on appeal in this case.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 18th day of February, 1942.

[Seal]

MILLARD P. THOMAS,
Clerk, United States District
Court for the Western Dis-
trict of Washington.

By: ELMO BELL

Deputy. [59]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Be It Remembered that heretofore, on to-wit, the 7th day of May, 1941, the same being one of the judicial days of the May Term of said court, this matter came on for hearing before the Honorable Jeremiah Neterer, one of the judges of said court, without a jury, whereupon the following proceedings were had and testimony taken in due form of law.

Appearances:

THOMAS R. WINTER, ESQ.,

Attorney for the Plaintiff.

ALLEN FROUDE & HILEN,

By GERALD DeGARMO, ESQ.,

Representing the Defendants. [*1]

The Court: You may proceed.

Mr. DeGarmo: If your Honor please, there are some matters in connection with this hearing concerning which we are not exactly in agreement on, but I think as the trial proceeds, we will be able to agree on many things; but it has occurred to me that it would be quicker to agree as the trial proceeds rather than to try to agree in advance.

Mr. Winter: If your Honor please, it may become necessary for me to appear as a witness in this case because of the proceeding before the Bank-

*Page numbering appearing at bottom of page of Original Reporter's Transcript.

ruptcy Court, and I will ask leave of the Court and of counsel to argue the case at its conclusion if I am to appear as a witness, also.

The Court: Is there any objection?

Mr. DeGarmo: None whatever.

The Court: Very well. You may argue, as well as testify.

Mr. Winter: If the Court please, I have prepared a trial brief which we think will be of assistance to the Court in the consideration of this case as the trial proceeds. If I may explain to the Court, this is a suit brought by the United States against the Coast Wineries, Inc., a corporation, and the United States Fidelity and Guaranty Company, a corporation. It is based upon an assessment levied and entered February 27, 1935, against the Coast Wineries for \$3,162.56 on approximately 10,000 gallons of wine—what we contend is wine, which was liable for tax, as a rectification tax. The law which is—

The Court: Take up the law afterwards.

Mr. Winter: Now, the plaintiff herein contends that there is due the United States this amount of tax under [2] this bond, the bond of which has been admitted the execution and the sufficiency of the bond having been admitted by the plaintiff. The defendant, by its answer, has admitted the first and second and third allegations. We have alleged that the Coast Wineries was a corporation organized and existing under the laws of the State of Wash-

ington, as set forth in the complaint. They admit it is a corporation, apparently making some point of the fact that on, I think it was, June 19, 1935. It has admitted by counsel that it was a corporation doing business and manufacturing and selling wine up until June 17, 1935, when it was adjudicated a bankrupt and its operation ceased, and was operated by the predecessor in the liquidation proceeding.

The Court: It did not affect its corporate existence, but it did affect its business.

Mr. Winter: Our contention is that all of the tax was incurred, by which the bonding company, surety, would become liable under this bond. This is in the nature of a suit in law on a bond, and we expect to show that the defendant bonding company is liable for this amount of money.

We will call Mr. Carlton.

Mr. DeGarmo: I would prefer to make our statement now so that your Honor will have all positions clearly before you. The chief defense of the defendant in this case, the principal defendant, the United States Fidelity and Guaranty Company, is based upon matters of record which appear in the matter of the bankruptcy of the Coast Wineries. Our principal defense being that it is *res judicata* and also estoppel created by the actions of the government and its agents in the Coast Wineries bankruptcy. It appears from the record in the [3] Coast Wineries, and we have the files brought over here so that they are now in court, that the government came in to the bankruptcy proceeding, or in the

reorganization proceeding, and filed three creditors' claims, each for a large amount of cost in the sum of \$9,000, and it is admitted that there was included \$3,162.56 which is now being admitted to be collected from the defendant, United States Fidelity and Guaranty Company.

There was a second claim which was for capital stock liability, and the third tax, which was for some tax liability. After the adjudication in bankruptcy of the Coast Wineries, the trustee filed exceptions, or objections, to those three claims, the claim for the \$9,000 tax, which included the tax, and the matter came on for a hearing before the trustee, and the record shows that on the 18th day of June, 1935, a letter was filed with the clerk of the court, signed by the Collector of Internal Revenue at Tacoma, in which he states that his claim for \$9,000, which includes the tax due, had been paid by the Federal Government, and that they were withdrawing the claim.

The trustee, or special master, who was hearing that matter, then made his recommendation to Judge Webster in Spokane, and in this recommendation was a report that this particular claim had been withdrawn, the tax having been paid, and subsequently Judge Webster entered a memorandum opinion which is in the files and will be introduced, in which he approves the recommendations of the special master. That was entered in 1935, I believe.

Some two years later, in 1937, the government came into the bankruptcy proceedings against the Coast Wineries and [4] filed a separate creditors' claim for the three thousand one hundred fifty-six dollars and some cents tax, which they are now attempting to collect here. The trustee made oral objection to that claim before Judge Webster, and Judge Webster on, I think, the 12th day of October, 1937,—

The Court: November.

Mr. DeGarmo: It is November, that is right. The hearing was on the 5th of November, and on the 12th of November, Judge Webster entered his order stating that the claim was disallowed and expunged. Now, that was the identical tax for which they now sue the United States Fidelity and Guaranty Company, and it is our position that that order entered in the Bankruptcy Court was in adjudication of the liability of the principal, with this tax, which they are now attempting to collect from the surety, and that the surety was discharged by the operation of that order, the same as the principal, and for that reason the defense is *res judicata* based on that order, and that the order pleaded the defense of estoppel, based upon our position; that when it appeared that the government was going to collect some \$6,000 or \$7,000 in tax upon the liquor on which this rectifying tax was claimed to have been due, the government agreed to the withdrawal of the original claim for \$9,000, which included the \$3,156 claimed and sued on herein.

That notice reached the surety company of the fact that the government had agreed to abate that claim, and that they were not looking to the surety, who would look only to the bankruptcy proceedings, and in reliance on that and in reliance upon a letter from the collector, the surety did not prosecute the claims which it had against the indemnitors under this bond, only [5] against Mr. N. J. Dolph and only one against Mr. W. A. Hubbert, who is associate counsel in this case, an attorney of Yakima, and that we also refrained from paying that tax, which we have a right to do, and filed a subrogation claim in the bankruptcy proceeding in order to obtain our property and assets in the bankruptcy proceeding. Now, we refrained from doing that, and in reliance of the government's representation that that tax was paid and that there would be no liability on our bond, and about two years subsequently, the government came up and asserted this claim against us. In the meantime, Mr. Dolph had died and his estate had been probated, and the time for filing the claim had expired, and we lost that right of indemnity against him or his estate, and we lost any right for a claim in the bankruptcy proceeding, and we claim that that is not an estoppel for remedying the past, which they took in a court of record, stating that the tax had been abated, and they cannot now assert that claim against us.

There is a third claim for a set-off, upon which there seems to be some dispute of the facts. We

claim that the government entered into possession of some \$700 which should apply to the bankruptcy subsequent to its adjudication, and that it was supposed to have, or should, under the ruling of the trustee as surety, have retained that money and applied it to the payment for taxes, and that having done so, we are entitled to have any judgment as entered, as a set-off to that amount. That is, I think, what constitutes our defense which will be asserted by the defendant.

The Court: Is it conceded that the revenue stamps were ordered purchased by Judge Webster, in the bankruptcy [6] proceeding?

Mr. DeGarmo: I think that has to be conceded, from the record.

The Court: If that is conceded, that claim will have to be paid.

Mr. DeGarmo: I think that is probably true. We do not wish to waive that claim, because we feel that there is some merit to it; but I appreciate—I think the record establishes that the stamps were purchased by the trustee pursuant to direction of Judge Webster, to be placed upon this liquor which was sold, upon which the government claims some \$6,700 in taxes.

The Court: If that is admitted, then I do not think much time need be devoted to that particular issue, because if the stamps were purchased by the trustee, that under the order of Judge Webster they were purchased out of the assets of the estate. Of course, the assets were not depleted in any way.

You may proceed.

Mr. Winter: We will call Mr. Charlton.

The Court: Let me make another inquiry. I gather from the pleadings that the taxes sought to be recovered were levied. Is there any dispute about that?

Mr. DeGarmo: There is no dispute on my part that the government originally made an assessment,—a telegraphic assessment, of these taxes. I would wish to object to the introduction of any evidence of assessment on the ground that the record shows that in the bankruptcy proceeding an abatement of those taxes and that, therefore, the matter of assessment is not material in this case. [7]

Mr. Winter: Of course, our contention is that the bankruptcy proceeding does not show an abatement.

The Court: I assume it is admitted that the assessment levied was properly made, and the issue herein is upon the abatement afterward?

Mr. DeGarmo: That is correct. I do not deny that there was an assessment made, but I object to any evidence or testimony in this case upon the ground that the record shows an abatement of taxes which the government cannot deny, because it is a matter of record.

The Court: You would have to have the assessment in order to have the abatement.

Mr. DeGarmo: That is correct.

The Court: They say, if it was admitted, that the assessment was duly made and the defense

urged against that assessment is abated, then there would be no claim upon the assessment and we would be right back to the beginning.

Mr. Winter: For the purpose of the record, your Honor, I will offer in evidence a certified photostatic copy of notice of adjustment of claim for abatement, and other documents attached thereto. I will ask, if your Honor please, that these be marked for identification.

(The documents referred to were marked for identification as "Plaintiff's Exhibit No. 1.")

Mr. Winter: We will offer in evidence, if the Court please, a certified photostatic copy of the assessment, certified by the assistant clerk of the treasury. There is attached to the certificate three papers which we are not asking to be admitted at this time.

The Court: Don't you think the admission is as [8] strong as your certificate?

Mr. Winter: I think this will be of information to the Court in understanding the other exhibits that will be introduced later on in this case, if your Honor please.

The Court: Let it go in.

(The documents previously marked as "Plaintiff's Exhibit No. 1" for identification were received in evidence.)

Mr. Winter: Is it also admitted that notice and demand was made upon the Coast Wineries for assessment of taxes on March 1, 1935, as alleged?

Mr. DeGarmo: It may be so admitted.

Mr. Winter: The next we will offer is a letter dated June 6, 1935, addressed to the United States Fidelity and Guaranty Company.

Mr. DeGarmo: We have the original of that, and we do not object to your introducing it.

Mr. Winter: We will offer in evidence a copy of the letter dated June 6, 1935.

The Court: There is no objection to its being a copy, as I understand?

Mr. DeGarmo: No.

The Court: Admitted.

(The document above referred to was marked "Plaintiff's Exhibit No. 2" and received in evidence.)

Mr. Winter: Now, if your Honor please, we would like to offer in evidence, and we will offer in evidence the original bond, for the purpose of the record.

Mr. DeGarmo: There is no objection.

The Court: Admitted. [9]

(The document above referred to was marked "Plaintiff's Exhibit No. 3" and received in evidence.)

Mr. Winter: Do you have the original bond?

Mr. Charlton: Yes.

Mr. Winter: May that be marked as government's exhibit?

The Court: Is that a part of the files of the bankruptcy proceedings in Spokane?

Mr. Winter: No, your Honor.

The Court: Very well.

Mr. Winter: Now, if the Court please, attached to "Plaintiff's Exhibit No. 1" is a certified photostatic copy of the trustee and bankruptcy's claim for abatement, filed September 19, 1935, a certified copy of the assessments as abated, and a notice of claim for abatement.

Mr. DeGarmo: I do not object to the introduction in evidence of the claim of the trustee in bankruptcy for abatement of the tax. I do object to the introduction in evidence of the notice from the Commissioner of Internal Revenue as to the abatement of a portion of the tax, upon the ground that in so far as this proceeding is concerned, they must be bound by the record of the bankruptcy proceeding to which they made themselves a party by filing the proof of claim and participating in the hearing and—

Mr. Winter: I might say, your Honor, that our proof of the abatement may be immaterial at this time. However, in the interest of saving time, we admit that the \$3,162.65 has not been paid either by the Coast Wineries or by the bonding company, and it may have been abated or might have been res judicata under that terminology. [10]

Mr. DeGarmo: That is correct.

The Court: The ruling is reversed on the admission of counsel.

Mr. Winter: I think that is the government's case, your Honor.

The Court: Do you want to cross-examine?

Mr. DeGarmo: No questions.

The Court: Proceed with the defense.

Mr. DeGarmo: I would like to call Judge Grady to the stand.

THOMAS E. GRADY

was called as a witness for and on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you state your name, please?

A. Thomas E. Grady.

Q. Where do you reside, Judge?

A. Yakima.

Q. What is your occupation or profession?

A. An attorney.

Q. How long have you been practicing that profession? A. Thirty-six years.

Q. And has that been continuously in and around Yakima? A. Yes.

Q. Judge Grady, in 1935, did you act as attorney for the trustee in bankruptcy of the Coast Wineries, Inc.?

A. The firm of Clark & Grady did. [11]

Mr. Winter: Now, if the Court please, in order that we may make a record, we want to skip to the next question.

(Testimony of Thomas E. Grady.)

Mr. DeGarmo: I think maybe I can eliminate—

The Court: Take up the next question. We will cross the bridge when we reach the stream.

Mr. Winter: Very well.

By Mr. DeGarmo:

Q. At this time, who was the trustee in bankruptcy?

A. Yakima Valley Bank & Trust Company.

Mr. DeGarmo: There are a number of papers here attached to the files that we want to introduce in evidence as a part of our case. I have had copies made so that we may substitute copies for the originals.

The Court: Have you submitted the copies to the other side?

Mr. DeGarmo: Yes. Mr. Winter has had copies of these for some time.

I would like to offer at this time from the files in the matter of Coast Wineries, Inc., debtor, No. B-1959, in the District Court of the United States for the Eastern District of Washington, Southern Division, three creditors claims filed by Alex McK. Vierhus, Collector of Internal Revenue, for taxes, and those claims appear in the claim file, which is Claim No. 1. I ask permission to substitute copies for the originals, which are in the file.

The Court: As one exhibit?

Mr. DeGarmo: No, I would like to have them filed as three exhibits.

(Testimony of Thomas E. Grady.)

The Court: What will be the number? [12]

The Clerk: Defendant's A-1, A-2, and A-3.

Mr. DeGarmo: A-1 being a claim for nine thousand and some dollars for tax, plus interest of 1% from March 1, 1935, to date paid, which has been introduced as a part of the government's case.

No. 2 is a claim for \$501.67, being the capital stock tax.

Exhibit A-3 being a claim for \$76.20, as a documentary stamp tax.

Mr. Winter: If the Court please, we object to the introduction of these claims, as being incompetent, irrelevant and immaterial. First, the claim, Defendant's A-2, is apparently a claim filed to cover—it was a liability which was incurred, and we do not think it should be accepted as a part of the defendant's case in this action. It has no bearing on this case.

The same thing is true of Defendant's Exhibit A-3.

With respect to Defendant's Exhibit A-1, we object to that as being irrelevant and immaterial, on the ground, first, that it was not necessary for the government to allege it as a part of the claim in the Bankruptcy Court, and it has no bearing in this case, and is no evidence, and should not be received.

Further, I do not think it should be withdrawn from the file.

(Testimony of Thomas E. Grady.)

The Court: I will reserve the ruling.

By Mr. DeGarmo:

Q. Judge Grady, as counsel for the trustee in the matter of Coast Wineries, Inc., at that time did you have occasion to examine three claims which were filed by the United States [13] Government for taxes? A. I did.

Q. What action was taken on those claims by the trustee?

Mr. Winter: Now, if the Court please, we object to any evidence as to what the trustee did.

Mr. DeGarmo: I will introduce in evidence the record. This is merely preliminary.

Mr. Winter: And, furthermore, it is irrelevant and immaterial what the trustee did with the claims. What are you having marked?

Mr. DeGarmo: I have not had anything marked as yet. I am going to.

By Mr. DeGarmo:

Q. Judge Grady, were objections filed by the trustee, to this claim for nine thousand some odd dollars—\$9,387.21? A. Yes.

Mr. Winter: The same objection, your Honor, as incompetent, irrelevant, and immaterial.

The Court: He may answer.

A. Yes.

Mr. DeGarmo: I will have marked as Defendant's Exhibit A-4, a statement of objections by the trustee, being a copy of the original which appears

(Testimony of Thomas E. Grady.)

in the matter of the files of the Coast Wineries, Inc.

The Court: As Exhibit A-4?

Mr. DeGarmo: It is a statement of objections.

The Court: Those are objections?

Mr. DeGarmo: To the claim of the United States Government; that is, the claim, A-1. We offer that document in evidence in lieu of the original, which is in the files [14] of the court.

Mr. Winter: The same objection, your Honor.

The Court: There is no objection because it is a copy?

Mr. Winter: No, your Honor.

The Court: The ruling is reserved.

Mr. DeGarmo: I now wish to have marked as Defendant's A-5, a motion of the United States of America, directed against the objections of the trustee.

(The document above referred to was marked "Defendant's Exhibit No. A-5" for identification.)

Mr. DeGarmo: I now offer in evidence "Defendant's Exhibit A-5," which is the motion of the United States against the objections of the trustee.

Mr. Winter: The same objection, your Honor.

The Court: The same ruling.

Mr. DeGarmo: I now wish to have marked as Exhibit A-6, a notice which was given by the referee in bankruptcy, by the Special Master in the

(Testimony of Thomas E. Grady.)

matter of the bankruptcy of the Coast Wineries, Inc., in the matter of the reorganization proceedings of Coast Wineries, Inc., of hearing upon a number of matters, including the amount, validity, and priority of the claim of the United States, which involved these taxes.

The Court: That is a notice of the referee?

Mr. DeGarmo: This is a notice of hearing before the master upon these claims. Here is a number of claims, including the claims of the United States, and I offer these in evidence as Defendant's Exhibit A-6.

Mr. Winter: We object to that, if your Honor please, upon the ground that it has not been shown that the plaintiff, [15] the United States of America, had any notice, or that such a notice was served upon it.

The Court: The ruling is reserved.

Mr. DeGarmo: I now wish to have marked as Defendant's Exhibit A-7, a copy of the letter from the Collector of Internal Revenue at Tacoma, with reference to this claim A-1.

The Court: What do you call it?

Mr. DeGarmo: It is a letter from the Collector of Internal Revenue at Tacoma, with reference to Exhibit A-1, being a letter which counsel, in the answer, has admitted was sent, in which the collector advised the withdrawal of this claim.

The Court: Is that the letter referred to in Judge Webster's orders?

(Testimony of Thomas E. Grady.)

Mr. DeGarmo: That is correct.

Mr. Winter: We object to it as incompetent, irrelevant, and immaterial as to any action taken by the collector.

The Court: Ruling reserved.

Mr. Winter: I object upon the further ground that it was not directed to any party in these proceedings, but to the Clerk of the District Court of the United States for the Eastern District of Washington.

The Court: The ruling is reserved.

Mr. DeGarmo: I now wish to have marked as Defendant's Exhibit A-8, three paragraphs from the Special Master's report and recommendation. These three paragraphs are a report of the Special Master with reference to three claims introduced here as A-1, A-2, and A-3. [16]

The Court: Is there any objection, Mr. Winter, to the reception of this report?

Mr. Winter: No objection to that but, your Honor, I think the whole document ought to be introduced in evidence. I have not had an opportunity to examine these; I have never seen them.

Mr. DeGarmo: I am perfectly willing that counsel look through these, if he so wishes.

Mr. Winter: I object to it on the ground stated.

The Court: The ruling on this is reserved. As I understand, you are making the same objection?

Mr. Winter: Yes, your Honor.

(Testimony of Thomas E. Grady.)

The Court: The objection is reserved.

Mr. DeGarmo: I now wish to have marked as Defendant's Exhibit A-9, a memorandum opinion by Judge Webster's ruling on the special master's report.

Mr. Winter: Was that furnished to me?

Mr. DeGarmo: Yes.

The Court: It is likewise referred to in his order?

Mr. DeGarmo: That is correct. These are the same things referred to in his order.

Mr. Winter: The same objection.

The Court: The ruling is reserved.

Mr. DeGarmo: Then I now wish to have marked as Defendant's Exhibit A-10—wait a minute. There is one before that. As Exhibit A-10, proof of claim, which was filed in the bankruptcy proceeding by the United States for this \$3,156 tax, which is now sought to be collected from the defendants in this case.

Mr. Winter: The same objection, your Honor.

[17]

The Court: The same ruling—reserved.

Mr. DeGarmo: And as Defendant's Exhibit A-11, the order by Judge Webster of November 12, 1937. I offer Defendant's 11 in evidence.

The Court: That is the order of November 12?

Mr. Winter: It is the order expunging the claim. The same objection, your Honor.

(Testimony of Thomas E. Grady.)

The Court: The same ruling—reserved.

By Mr. DeGarmo:

Q. Judge Grady, in connection with your duties as attorney for the trustee in the matter of the reorganization of Coast Wineries, Inc., and later as a bankrupt, did you have any conversations or dealings with a man by the name of Thomas Winter, who is now in the court room?

A. I did.

Q. In connection with the filing of these three claims? A. Yes.

Q. Is Mr. Thomas Winter the special attorney for the Collector of Internal Revenue?

A. Yes.

Q. And who appears of record as an attorney in this case? A. Yes.

Q. In connection with the three claims which were filed by the United States Government and which have been referred to here as Defendant's Exhibits A-1, A-2, and A-3, and the objections which were filed to those claims by the trustee, and the government's objections to those objections, did you have a conference or conversation with Mr. Winter? A. I did.

Q. Where did that take place; that is, in what city, Judge [18] Grady? A. Yakima.

Q. And when was that conversation with reference to the time that the wine had been ordered sold by Judge Webster? Was it before or after?

(Testimony of Thomas E. Grady.)

A. Afterwards.

Q. After the wine had been ordered sold by Judge Webster? A. Yes.

The Court: But before the sale?

Mr. DeGarmo: No, I think after the sale.

The Witness: It was during the time we were having the hearing on the master's report, or the hearing before the master.

By Mr. DeGarmo:

Q. That was after the sale, I believe?

A. Yes.

Q. Now, will you relate what that conversation was as it related to these three claims?

Mr. Winter: Now, if the Court please, we object to that as irrelevant and immaterial, and that any statements that he may have made to the trustee, or to the trustee's attorney, cannot bind the United States. Even if we had entered into some agreement, it would be irrelevant and immaterial and would have absolutely no bearing on the issues in this case.

The Court: I will let it go in the record. It may become material later on.

A. The three claims which have been mentioned here were under discussion between Mr. Winter and myself at the time of the hearing being held before the master, and Mr. Winter [19] told me that the government would withdraw the large claim of nine thousand and some odd dollars if the trustee would

(Testimony of Thomas E. Grady.)

approve and recommend for approval the other two claims.

The Court: What claims?

The Witness: The other two claims, the one for five hundred and some odd dollars, and one for seventy some odd dollars.

The Court: \$70?

The Witness: Yes.

By Mr. DeGarmo:

Q. It was an agreement to that effect on your part? A. It was.

Mr. Winter: I object to that as a conclusion.

The Court: What did you say with relation to that?

The Witness: I told Mr. Winter that I would recommend to the trustee that if the large claim was withdrawn that these other two claims be allowed, or recommended for allowance, rather.

The Court: Was that done?

The Witness: That was done.

By Mr. DeGarmo:

Q. And subsequently the trustee filed a claim for abatement of this \$9,000 tax?

A. Yes, sir. As I recall, there was some discussion about the advisability of clearing the government's record, and that the trustee should file a claim for abatement, which was done.

Q. As I understand it, the trustee did recommend the allowance of the two smaller claims upon the understanding with Mr. Winter? [20]

(Testimony of Thomas E. Grady.)

A. It did.

Q. Did you subsequently receive, Mr. Grady, a letter from the Collector of Internal Revenue concerning this tax, or did that letter come to the clerk of the court, to your knowledge?

A. It came to the clerk of the court.

Q. You are referring now to Defendant's Exhibit A-7? A. Yes.

Mr. DeGarmo: I think that already shows on the record, if your Honor please, in Defendant's A-8, which is the excerpt from the report of the special master.

The Court: Yes.

Mr. DeGarmo: There were two claims, one for \$76.20, and one for \$501.67, and they were confirmed by Judge Webster's memorandum opinion, which is the document, A-9, and the two claims were approved and allowed by the Court and by the special master.

By Mr. DeGarmo:

Q. Judge Grady, after the order of the court, which has been referred to, directing the sale of the wine, do you recall the amount that was received for the wine, upon sale?

A. \$12,000, and an extra \$500 was owing from another source.

Q. So that there was a total of \$12,500 received?

A. And what was the ultimate provision that was made for payment of the tax out of that to the government—out of that money?

(Testimony of Thomas E. Grady.)

Mr. Winter: If the Court please, the order of the court is the best evidence of what was done.

Mr. DeGarmo: I have no objection to the order of the court being used. [21]

Mr. Winter: Has that been introduced?

Mr. DeGarmo: Not yet. I don't have a copy of it.

Mr. Winter: It is in the record.

Mr. DeGarmo: I will have to make a copy of that order, and I will not use it at this time.

By Mr. DeGarmo:

Q. Just one thing further, Judge Grady. Are you familiar with the fact as to whether or not there was sufficient ultimately realized in the bankruptcy of the Coast Wineries, Inc., with which to pay any of the claims of creditors, or claims of the trustee, or his attorney, or any of the tax claims of the United States?

A. Yes. I remember——

Q. Was there any such amount received?

A. No, it was not sufficient to go beyond certain preferred claims.

Q. And of the amount which was realized from the sale of the wine to Mr. Rovig, was any amount of that paid to the government for taxes?

A. Yes.

Q. Do you know the amount of that?

A. I do not know the exact figure; it was somewhere around between \$6,000 and \$7,000.

(Testimony of Thomas E. Grady.)

Mr. DeGarmo: I think that is all. You may examine.

Cross Examination

By Mr. Winter:

Q. As I understand it, Judge Grady, the assets in the estate of the Coast Wineries were insufficient to pay the preferred claims, with the exception of this \$6,000 which was ordered by Judge Webster in his order of September 19? Do you recall [22] that order?

A. I do recall that, Mr. Winter; that is correct.

Mr. Winter: We ask that the order be marked and introduced in evidence as a part of the cross-examination. It will be found in the file. Shall we find it now, your Honor?

The Court: Is there any objection?

Mr. DeGarmo: No.

The Court: I think it ought to go in.

Mr. DeGarmo: It is a part of the files.

The Court: I think a copy of it should be made and substitute a copy, so that these papers can be returned.

Mr. Winter: That will be Exhibit 5?

By Mr. Winter:

Q. Then, I take it that this \$7,000 claim, which was subsequently attempted to be filed, and oral objection to its allowance, if it had been allowed, it could not have been put in that estate; is that correct? A. That is my opinion.

(Testimony of Thomas E. Grady.)

Q. And that was the opinion of the trustee?

A. Yes.

Q. With respect to the conference you say you had with me, you do not contend, Judge Grady, that you would withdraw your objections to those three claims, because we discussed the possibility of abating the tax covered by the \$9,000 claim, do you?

A. Yes, I do, Mr. Winter.

Q. You seriously contend it?

A. Yes, I do.

Q. Do you contend that I ever stated to you that I would [23] abate the claim?

A. You said the government would withdraw the claim.

Q. Didn't I tell you, Judge Grady, that I would recommend the abatement of it, or withdraw that claim?

A. You might have used that word, but the impression——

Q. All right.

The Court: Let him finish the answer.

A. (Resumed) But the impression you left with me, and upon which I acted, was that you were going to see that the claim was withdrawn by the Department.

By Mr. Winter:

Q. Do you have any valid objection to the capital stock tax claim or the other claim?

A. Yes.

(Testimony of Thomas E. Grady.)

Q. What?

A. It was assessed, as I recall, under the N. R. A., and that had been declared unconstitutional.

Q. Isn't it possible that that was an error?

A. No. I followed the decisions on that.

Q. What was your objection to that third claim? A. The same reason.

Q. When did you say you had that conference with me, and where it occurred?

A. That was, as I recall, at the first meeting on these claims before Mr. Clark, the Special Master.

Q. When did that occur?

A. I could not give you the date. I would have to refer to the letter.

Q. Will you refer to the record?

A. If you will show me when the first hearing was had. [24]

Q. You were the attorney for the trustee, weren't you?

A. Yes, but I cannot recall those dates.

(The witness referred to some papers.)

Q. Was it on September 18, 1935?

A. I would think so. I know that would be my best recollection that our conversation occurred just prior to what transpired in this record.

The Court: How long before?

The Witness: Just shortly before that.

(Testimony of Thomas E. Grady.)

By Mr. Winter:

Q. Do you recall, Judge Grady, or do you know that you and I had a conference with respect to this claim on \$9,000, and you did not talk a work about the claim for \$500, or the \$700?

A. That is not my recollection, Mr. Winter.

Q. Do you recall that you were insisting that the government's claim for the \$9,000 should attach to the proceeds of the sale after the payment of the costs of administration?

A. Not that claim.

Q. What claim?

A. The claim that we had reference to was the claim with reference to paying the stamp tax.

Q. And you made no objection to the trustee with respect to the allowance of the claim of the \$700 and the \$500—I mean the \$500 and the \$76?

A. I did.

Q. Was that recommendation in writing?

A. No.

Q. When did you file a claim for the abatement of the tax?

A. It was sometime later; I haven't the date in mind. If you can show me the copy, I will recall, I think. [25]

Q. It was the 18th day of September, 1935; is that right?

A. Whatever the record shows there, Mr. Winter, I would accept.

(Testimony of Thomas E. Grady.)

Q. (Counsel handing a paper to the witness).

A. Yes.

Q. The claim for abatement was later allowed for \$6,000—Do you have it there? It was allowed for \$6,224.65; is that right?

Mr. DeGarmo: I wish again to preserve our objection to that allowance for abatement by the Commissioner, on the ground that the government is bound by the record in the bankruptcy proceeding.

The Witness: That appears to be the record.

By Mr. Winter:

Q. You knew and then agreed that I could not withdraw the claim of my own order, didn't you?

A. You knew that I, as well as any other attorney, in stipulating——

Q. In stipulating. Do you mean to tell this Court, Judge Grady, that you and I stipulated that if I would recommend the abatement of this claim to this court that you would allow the other claims and that that was the consideration for it?

A. Yes, exactly.

Q. You knew that I could not abate the claim or withdraw it, didn't you, excepting to recommend it?

A. I know that you could by recommending it, and if that offer was accepted or forwarded——

Q. Didn't I say that it would take fifty days to recommend——

(Testimony of Thomas E. Grady.)

A. (Interposing) I don't know anything about that. [26]

Q. And then you would proceed to prepare your claims for abatement at that time?

A. I don't remember about that part of it.

Q. Then you thought I could abate it and suggested that you draw up a petition to abate it?

A. You requested it to clear the record.

Q. I requested that you make a claim for abatement, didn't I? A. Yes.

Q. And you said it was not to be made?

A. Yes, of course.

Q. Isn't that right? A. Yes.

Q. And then you say, Judge Grady, that it was an expression of mine saying that you recommend that and you agreed to allow the other claims?

A. Yes.

Q. Were the other claims ever allowed and paid?

A. They were allowed but not paid.

Q. You knew that there was not sufficient funds to pay them, didn't you? A. No.

Q. And the assets had been sold by April, 1935?

A. I think September, 1939.

Q. But the wine had been disposed of?

A. It was sold, yes.

Q. You had spent \$6,224 in stamps?

A. Yes.

Q. You had \$6,000, didn't you?

A. There were the containers and some equip-

(Testimony of Thomas E. Grady.)

ment that was [27] covered by the Consolidated Holding Company.

Q. And you filed a claim for refund for the \$6,000 with the trustee, didn't you? A. Yes.

Q. And you knew about the objections that were referred to the trustee? A. Yes.

Q. You were the attorney for Mr. Dolph, weren't you? A. No.

Q. Were you the attorney for the bankrupt before it went into bankruptcy?

A. No, just a trustee.

Q. The bank? A. Yes.

Q. And you felt that in some way this could be gotten out of the estate? Of course, you haven't realized that that enured to the benefit of the defendant, the United States Fidelity and Guaranty Company.

A. I had taken no interest in that.

Q. You have taken no interest in that?

A. No.

Q. To whom did you make the recommendation about withdrawing the objections to the claim?

A. Mr. Moe, acting trustee for the bank.

Q. Do you know Mr. Moe's signature?

A. Yes.

Q. And this so-called agreement that you say you had with me to withdraw your objection to the claims, if I would abate the tax, you say that occurred about the time of the hearing on the special master's report? [28]

(Testimony of Thomas E. Grady.)

A. That is my best recollection as to the time.

Q. Don't you recall that prior to that time the hearing had been continued because no action had been taken on the claim, and it was not known what the amount of taxes would be made under Judge Webster's order, and that was the reason the claim was withdrawn?

A. No, that is not my recollection.

Q. Did you prepare the claim for refund for the trustee?

A. I do not recall whether I prepared it or whether Mr. Moe prepared it. Maybe we both prepared it in conjunction with each other.

Q. In other words, you notarized it as notary public, is that correct? A. That is correct.

Q. You were familiar with the claim for refund, were you not? A. I think so, yes.

Q. You didn't see anything in the claim for refund that could be abated because you had allowed some other claim, did you?

A. No. We followed the form that is used by the Department.

Q. Well, just read to the Court what you said in that (counsel handing a paper to the witness).

Mr. DeGarmo: He does not need to read it.

Mr. Winter: We will offer it in evidence.

The Court: Very well, it may go in evidence.

By Mr. Winter:

Q. Now, the basis for your abatement was that

(Testimony of Thomas E. Grady.)

your claim for \$3,000 covered the rectification tax——

Mr. DeGarmo: If your Honor please, I submit that [29] that is in the record and that it will speak for itself.

The Court: It speaks for itself, of course.

By Mr. Winter:

Q. Now, Judge Grady, I think you testified that the government filed a claim for \$9,000 with the trustee. As a matter of fact, that was—the claim here referred to was filed with the trustee in the reorganization proceeding; isn't that correct?

A. I think that is correct, Mr. Winter, yes.

Q. And subsequent thereto, there was an order entered by the Court authorizing the trustee to sell all the assets, subject to liens?

A. Free from the liens.

Q. I mean the first order. Didn't you procure an order of the Court authorizing the trustee to sell; isn't that right?

A. I do not recall that first order, Mr. Winter. If you will refresh my recollection——

Mr. Winter: Do you have it there, the order of the court?

The Court: What is the letter that you are referring to, Mr. Winter?

The Witness: I think what Mr. Winter is referring to is the claim which I notarized.

Mr. Winter: Yes, the claim for abatement.

(Testimony of Thomas E. Grady.)

By Mr. Winter:

Q. Now, in the bankruptcy proceeding, there was a petition filed for relief under Section 77-B of the Bankruptcy Act? A. Yes.

Q. And you were appointed attorney for the debtor as trustee at that time? [30]

A. The trustee was appointed and then he was authorized to engage his counsel.

Q. And then, on about June 16, the Coast Wineries, Inc. was adjudicated a bankrupt?

A. Yes.

Q. In 1935——

A. After the reorganization failed.

Q. After the reorganization failed?

A. Yes.

Q. The reorganization proceedings were filed on February 9, 1935, and were continued from time to time until June 16, when a trustee in bankruptcy was appointed? A. Yes.

Q. And on June 16, Exhibit A-1 was filed with the trustee? A. I believe so.

Q. As trustee of the debtor corporation?

A. I think the record so shows, yes.

Q. And on June 17, an order directing liquidation of the assets of the debtor was entered by Judge Webster? That is the date, isn't it?

A. I think that is correct.

Q. I will show you this paper and ask you if it is not a fact that you filed a petition on the same

(Testimony of Thomas E. Grady.)

day—you filed a petition for the sale of the property. A. Yes.

Q. And you drew that as attorney?

A. Correct.

Q. An order directing the sale of the property was entered on the same day? That is Judge Webster's signature, isn't it? [31]

A. That is Judge Webster's signature.

Q. And on the same day there was an order entered appointing appraisers? A. Yes.

Q. Order directing notice to creditors of the bankrupt? A. Correct.

Q. On the 26th day of June, 1935, there was a notice of the sale of the property, by private sale, pursuant to that order authorizing you to sell the property? A. Yes.

Q. And you filed an affidavit opposing the notice, and then, on June 26, 1935, it was to be held for the private sale, and notice was issued revoking the previous order of sale?

A. Not the previous order; the previous plan of sale.

Q. The previous plan of sale?

A. Yes. Do you wish me to explain?

Q. I wish you would explain to the Court just what happened with reference to the plan of sale.

A. A party by the name of Lustig had been negotiating to buy this wine for the purpose of distilling it, and it was felt that if that plan was

(Testimony of Thomas E. Grady.)

carried out, the stamp tax for which the government was contending might not be collectable, but a distilling tax in its place, and the trustees thought it would be better for us to sell to Mr. Lustig than to Mr. Rovig, but when it was taken up before Judge Webster, the Judge held that the trustee must follow the order of sale, and the Lustig deal then was abandoned and Mr. Rovig's bid was accepted.

Q. And the sale was confirmed on June 27, 1935, by Judge [32] Webster? A. Yes.

Q. All right. Subsequent to that time, isn't it a fact that Mr. Rovig, the purchaser, filed a petition with the Court asking to have that sale cancelled and set aside, or in the alternative, that the trustee be directed to pay the tax on the wine?

A. Such a petition was filed.

Q. And there was a hearing held before Judge Webster? A. A hearing was held.

Q. And after that hearing, Judge Webster, on September 16, 1935,—pursuant to this order the trustee purchased stamps in some \$6,000; isn't that right?

A. It was approximately that amount.

Q. Well, it was the amount which was later abated, according to this exhibit, Plaintiff's Exhibit No. 1?

Mr. DeGarmo: I think that is a fact, Mr. Winter.

(Testimony of Thomas E. Grady.)

Mr. Winter: It was the amount that the Court required us to purchase.

Mr. DeGarmo: The record will disclose definitely what it was.

By Mr. Winter:

Q. So that there will be no doubt about it, can you turn to your petition which is filed with the court for discharge—for settlement and discharge and see the amount which was expended by the trustee? A. If you have the file there.

Q. I don't think that is so important, but in any event, Judge Grady, it was approximately \$6,000 in stamps that the trustee purchased in accordance with this order of September, [33] 1935, of Judge Webster? A. That is correct, yes.

Q. And subsequent to that time or, rather, you acknowledged, as notary public, and the trustee filed his claim for abatement of the tax?

A. Yes.

Q. You set forth in there, of course, that you had purchased these stamps necessary, in accordance with the Court's order? A. Yes.

Q. As a matter of fact, you filed a claim—I mean you entered a claim for refund for the additional amount which you had purchased in excess of the amount of the order in the sum of \$735.22?

A. Yes.

Q. And that \$735.22 was turned in and you received a refund on those stamps?

A. Correct.

(Testimony of Thomas E. Grady.)

Q. And those stamps were all purchased out of the \$12,000 which was received from Mr. Rovig for the wine which you sold under the order of the Court? A. Yes.

Q. When did you, as attorney for the trustee, receive notice of the disallowance for the claim for abatement?

A. I would not have in mind the date of that.

Q. But you did receive notice?

A. It came in due course of time.

Q. And after you received notice and paid out this tax, you filed a claim for refund?

A. Yes. [34]

Q. And it was also denied? A. It was.

Mr. Winter: That is all.

Redirect Examination

By Mr. DeGarmo:

Q. What was the reason that you filed the claim for refund on this stamp tax which had been paid?

A. It was discovered that the wine was not salable or usable wine.

Q. In other words, after this \$6,000 and more had been paid, then the wine could not be sold by the purchaser?

Mr. Winter: That is objected to as a conclusion and not proper examination.

The Court: On cross examination that is per-

(Testimony of Thomas E. Grady.)

missible. This is cross examination of the cross examination.

Mr. DeGarmo: I think that is all.

Recross Examination

By Mr. Winter:

Q. As a matter of fact, you sold it for \$12,000, didn't you, as trustee? A. Yes.

Q. And then you don't know, of your own knowledge, how much Mr. Rovig sold in the open market, do you, of your own knowledge? A. No.

Mr. Winter: That is all.

Further Redirect Examination

By Mr. DeGarmo:

Q. You do know that the bulk of it burned up after this, don't you? [35] A. Yes.

Q. You also knew that the government refused to confirm the sale of it? A. It did.

The Court: Is that all?

Mr. DeGarmo: That is all.

(The witness was excused.)

Mr. DeGarmo: Mr. Murray, will you take the stand, please?

A. W. MURRAY

was called as a witness by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you please state your name?

A. A. W. Murray.

Q. Mr. Murray, you reside in Seattle, do you?

A. Yes, sir.

Q. And what is your business?

A. I am superintendent of the Claim Department of the United States Fidelity and Guaranty Company for the State of Washington.

Q. That is the United States Fidelity and Guaranty Company who is one of the defendants in this action?

A. Yes, sir.

Q. As superintendent of the Claim Department, do you have charge of recoveries on bonds?

A. I have charge of claims made against or on account of [36] bonds.

Q. And during the course of your duties as superintendent of the claim department, did the matter of the bonds written by the United States Fidelity and Guaranty Company for the Coast Wineries, Inc. come to your attention?

A. Yes.

Q. You are familiar with the two bonds which were given by the U. S. F. & G. to the government on behalf of the Coast Wineries, Inc., and which are in evidence in this case?

A. I am.

(Testimony of A. W. Murray.)

Q. At the time those bonds were written, or subsequently, did the United States Fidelity and Guaranty Company ask for or require indemnity on their behalf?

A. At the time the bonds were written, the indemnity agreements were taken from Mr. Hubbert, an attorney at Yakima, Mr. Dolph, of Spokane, now deceased, and several others.

Q. Mr. Murray, I hand you what has been marked "Plaintiff's Exhibit No. 2." Will you state whether the United States Fidelity and Guaranty Company, of which you are superintendent of the Claim Department, received the original of that letter? That is the notice of the determination by the government on the surety.

A. Yes, I received the original.

Q. Subsequent to the receipt of that letter, did you make any investigation concerning possible liability of the defendant, United States Fidelity and Guaranty Company, upon the bonds?

A. Yes. I had several conferences with the alcohol tax unit in Seattle.

Q. Were those conferences with any particular individual? [37]

A. I talked with Mr. Jackson who was, I understood, attorney for the alcohol tax unit—with Mr. Jackson particularly, and I may have had a discussion or two with Mr. Jordan.

Q. And subsequent to the receipt of this order

(Testimony of A. W. Murray.)

of determination which, I think, is dated June 6, 1935— A. Yes, June 6, 1935.

Q. Did you have a conversation with Mr. Jackson in Seattle at the office of the alcohol tax unit in which you discussed with him the matter of possible liability under your bonds?

A. I did.

Q. Will you state what that conversation was?

Mr. Winter: I object to that on the ground that it is irrelevant and immaterial and not within the issues of this case.

The Court: I will receive it; it may go in the record.

Mr. Winter: As a matter of fact, the witness has not testified as to what the official position of Mr. Jackson was.

Mr. DeGarmo: He said he understood he was attorney for the alcohol tax unit.

Mr. Winter: If he understood a fact that was not so, it would be very material whether or not he should be able to testify; if he did not, then he would be testifying to something that was not true.

The Witness: He was so represented to me as attorney for the alcohol tax unit. He was the man to whom I was referred to discuss the matter as having charge of it.

By Mr. DeGarmo:

Q. Will you state what the conversation [38] was?

(Testimony of A. W. Murray.)

A. The conversation was with reference to protecting ourselves by filing a claim in bankruptcy, primarily, and also in regard to the nature of the tax for which demand was made, and I received an explanation of the various items of tax from Mr. Jackson, which was incorporated in a report to me and my office, as I was not familiar with the practice of the government or the nature of the taxes that were sought to be recovered. At that time, it was agreed that the government—

Q. State what was said, not what occurred.

A. I asked him what about filing a claim in bankruptcy, and he stated that he thought the government would file a claim; so the matter rested at that point.

Q. Now, on a subsequent occasion, did you have another conversation with him concerning the course which the government was taking with respect to this claim in the bankruptcy proceeding, or with some other representative of the alcohol tax unit?

A. I could not say it was with Mr. Jackson, but I did have other conferences with other members of the alcohol tax unit office.

Q. Did you, at any time, Mr. Murray, learn that the claim of the government had been withdrawn for the tax that they had filed a claim for?

A. I did, but not in the office of the alcohol tax unit in the first instance.

Q. From whom did you learn that?

(Testimony of A. W. Murray.)

A. From Judge Grady on a trip that I made to Yakima in which he described the progress of the bankruptcy and the [39] claims.

Q. Now, you have stated that Mr. N. J. Dolph was one of the indemnitores on these bonds in this case? A. Yes, sir.

Q. Was Mr. Dolph a responsible individual who could have been held responsible on a claim had one been filed against his estate?

A. He is in—

Mr. Winter: (Interposing) Objected to as calling for a conclusion of the witness. The record of the estate would be the best evidence.

Mr. DeGarmo: I anticipated that counsel would object, and I have a certified copy of the inventory and appraisement here, and I will ask that this be marked as Defendant's Exhibit A-12 for identification.

(The document above referred to was marked for identification as "Defendant's Exhibit A-12.")

Mr. DeGarmo: I offer in evidence as "Defendant's Exhibit A-12," certified copy of the inventory and appraisement of the estate of Norman J. Dolph, in the Superior Court of Spokane County.

Mr. Winter: Objected to as irrelevant and immaterial. It does not show when it was filed or anything of that nature, and it does not appear to be within the issues of this case.

(Testimony of A. W. Murray.)

The Court: Ruling reserved.

Mr. DeGarmo: Mr. Clerk, will you mark this for identification, please?

(The document above referred to was marked "Defendant's Exhibit A-13" for identification.) [40]

Mr. DeGarmo: This is a certified copy of the notice to creditors published in the Dolph estate showing when the time for filing creditors' claims expired.

I now offer A-13.

Mr. Winter: The same objection, your Honor, as being irrelevant and immaterial.

The Court: Ruling reserved.

By Mr. DeGarmo:

Q. Mr. Murray, after receiving notice from the government, notice and demand, of June 6, 1935, did you take steps to press a claim against the estate of Mr. Dolph?

A. I did. I notified the administratrix of the estate, who was Mrs. Dolph.

Q. Now, subsequent to receiving word that the claim of the government for \$9,000 had been withdrawn, what action did you then take with respect to a claim against the estate?

A. I did not take any further action.

Q. You did not file a claim when you found that claim had been withdrawn?

(Testimony of A. W. Murray.)

A. No. I took no further action whatever in the entire matter.

Q. As a matter of fact, Mr. Murray, wasn't that claim closed in this matter for some two years?

A. Yes, sir.

Q. When was it reopened?

Mr. Winter: Objected to as irrelevant and immaterial. As to when the claim was opened or closed is immaterial.

The Court: It will be received.

A. Oh, after receiving a new demand for the \$3,000 tax, [41] approximately, I reopened the file.

By Mr. DeGarmo:

Q. Can you refer to your file and give me the date when you received that demand, or the last demand?

The Court: Which one is that to which you are referring?

Mr. DeGarmo: The one of June 6, 1935, the original demand.

The Court: Isn't that sufficient?

Mr. DeGarmo: After this thing had all been closed, they came back with this second demand for \$3,156 which they are now suing for. This was all closed and they came back with a second demand.

Mr. Winter: It is the formal demand. The letter of June 6th is not a demand.

(Testimony of A. W. Murray.)

The Court: That is not?

Mr. Winter: No, your Honor. The letter of June 6th is notifying the bonding company. The letter says, "Notice is hereby given of your liability to the extent of your bonds for any such taxes not collected from the bankrupt estate, in order that you may take any action you may deem necessary."

In other words,—

The Court: (Interposing) I do not know about the other words. Will you tell us?

Mr. Winter: I have a copy of it, I think, your Honor (counsel referring to a paper). Yes, here it is. It is March 9, 1939.

The Court: March 9, 1939; is that right?

Mr. Winter: I have a copy of it, your Honor. It [42] is a registered letter.

The Court: A demand for claim?

Mr. DeGarmo: That is right.

Mr. Winter: Counsel admitted the demand on the bankrupt.

Mr. DeGarmo: I will offer this in evidence.

Mr. Winter: May I substitute a copy? This is my own personal copy.

The Court: That may be withdrawn from the file and later file a copy.

(The document above referred to was marked "Defendant's Exhibit A-14" for identification.)

(Testimony of A. W. Murray.)

Mr. DeGarmo: "Defendant's Exhibit A-14," I understand it is stipulated that that is a copy of the notice which was received by the defendants for the tax sued on herein?

Mr. Winter: Yes.

The Court: Proceed.

By Mr. DeGarmo:

Q. As I understand it, no claim was filed against Norman J. Dolph's estate for liability under these bonds? A. No, sir.

Q. Was any claim filed in bankruptcy against the Coast Wineries, Inc. under the bonds by the United States Fidelity and Guaranty Company?

A. Yes.

Q. In bankruptcy?

A. Of the Coast Wineries?

Q. Yes, by the defendant, United States Fidelity and Guaranty Company. [43]

A. Not by the United States Fidelity and Guaranty Company, but by the United States.

Mr. DeGarmo: I think that is all. You may examine.

The Court: Cross-examine.

Cross Examination

By Mr. Winter:

Q. Mr. Murray, who did you say you had as guarantors of the bond, or as guarantee to the pay-

(Testimony of A. W. Murray.)

ment of the bond in the event there was any liability on the bond? A. N. J. Dolph.

Q. Was it not J. J. Dolph? A. Yes.

Q. Who else? A. Mr. Hubbert.

Q. What are his initials?

A. Mr. W. A. Hubbert, and Mrs. Hubbert.

Q. And Mrs. Hubbert? A. Yes.

Q. Who else?

A. I think there was a man by the name of McKenzie (witness referring to paper)—C. T. McKenzie, and Bertha McKenzie.

Q. Do you have any other indemnitor agreements there? A. No, sir; I have none.

Q. When was Mr. Dolph's indemnity agreement taken? A. The date does not appear.

Q. This indemnitor agreement—

A. (Interposing) That is one of them. I think there were two bonds. That is on the \$5,000 bond.

Q. That is on the \$5,000 bond? [44]

A. Yes. I think this is a part of it (witness referring to papers).

Q. Then, for any liability agreement on the bond prior to January 5, 19—or January, 1935, you would not have any indemnity—you would not be entitled to indemnity from the Dolph estate, would you, Mr. Murray, on that \$5,000 bond?

A. I don't know whether this is a renewal. I believe the bonds were renewed, and I also had an indemnity agreement on the original bond. That would be attached to that.

(Testimony of A. W. Murray.)

Q. Isn't it a fact, Mr. Murray, that Mr. Dolph did not go into the company until about January, 1935, and you released Mr. Hubbert in 1935 and you took Mr. Dolph as indemnitor on the bond?

A. No.

Q. Are you sure about that?

A. I am sure that I never released Mr. Hubbert.

Q. You are sure that you never released Mr. Hubbert? A. Yes.

Q. At least, you had an indemnity agreement with Mr. Hubbert about a year before you had an indemnity agreement with Mr. Dolph; isn't that true?

A. Yes, we had an indemnity agreement from Mr. Hubbert in 1934.

Q. In 1934? A. Yes.

Q. Covering the year 1934?

A. Well, covering any loss that might be occasioned by the bond that was then executed, whenever it would occur. If you can give me a little more time on this, I can find it, perhaps, Mr. Winter. The file is voluminous (witness refers [45] to papers). I haven't the original indemnity agreement here, but I have a copy of the report on the bond, executed on February 1, 1934, in which it—I think it is noted that we had an indemnity with N. J. Dolph.

Q. By Mr. Hubbert, you are referring to the Mr. Hubbert who is here in court, and his initials are what? A. W. A. Hubbert.

(Testimony of A. W. Murray.)

Q. W. A. Hubbert? A. Right.

Q. Do you know when the liability for the tax accrued under these bonds? A. I do not.

Q. Haven't you been advised time and time again that it was after 1934, and not for 1935?

A. That is a matter of record. The record would so show.

Q. Do you have a copy of the notice, or the notice which you gave the executrix of the Dolph estate as to contingent liability under the bond?

A. Yes, I do.

Q. Have you got it with you?

A. I believe so.

(The witness produced some papers.)

Mr. Winter: I will ask that these be marked as Plaintiff's Exhibits 6 and 7 for identification.

(The documents referred to were marked "Plaintiff's Exhibit No. 6" and "Plaintiff's Exhibit No. 7" for identification.)

By Mr. Winter:

Q. Do you have the registered receipt?

A. Yes, I have. Here is a registered receipt from Mrs. [46] Dolph and Mrs. Hubbert (witness producing some papers).

Q. You did send these registered, these which are marked for identification as "Plaintiffs Exhibit 6" and "7"? You sent them by registered mail, and these are copies of the letters which you mailed? A. That is right.

(Testimony of A. W. Murray.)

Mr. Winter: We will offer them in evidence.

Mr. DeGarmo: There is no objection.

(The documents previously marked "Plaintiff's Exhibit 6" and "Plaintiff's Exhibit 7" for identification were received in evidence.)

By Mr. Winter:

Q. You haven't released Mrs. Dolph as indemnitor or an an executrix, under the bond, have you, Mr. Murray, by any action on your part?

A. There is nothing to release her from, so far as herself is concerned.

Q. As a matter of fact, Mr. Murray, you told me personally that you had indemnity on the bond, and that was the reason why we could not get together on the amount due on the bond; isn't that right?

A. Absolutely correct.

Q. How? A. That is absolutely correct.

Q. Yes.

Mr. Winter: That is all.

Redirect Examination

By Mr. DeGarmo:

Q. Mr. Murray, after you sent these letters, which have been introduced in evidence, one of them to Mrs. Dolph, you had considerable correspondence with Heil, Davis, and Heil [47] of Spokane, the attorneys representing the Dolph estate?

A. I did.

(Testimony of A. W. Murray.)

Q. And in those letters, did they indicate to you that if any claim was filed, they would disallow it on the ground that the claim had been withdrawn by the government?

Mr. Winter: That is objected to upon the ground that it is hearsay and not binding on the United States, and not proper redirect examination.

Mr. DeGarmo: I asked Mr. Murray whether after these letters had been sent, one to Mrs. Hubbert, one to Mr. Hubbert, and one to Mrs. Dolph, he had considerable correspondence with Messrs. Davis and Heil, attorneys at Spokane, representing the Dolph estate, regarding this claim for indemnity in which they indicated that if any claim was filed against the estate, they would disallow it upon the ground that the government had withdrawn its claim against the bankrupt.

Mr. Winter: I object, if the Court please, upon the ground that it is hearsay and not binding upon the United States.

The Court: I think this objection will be sustained. It is sustained.

Mr. DeGarmo: I will withdraw the question. That is all, Mr. Murray.

(The witness was excused.)

Mr. DeGarmo: That is our case, if your Honor please.

The Court: Is that the defense?

Mr. DeGarmo: That is the defendant's case, if your Honor please. [48]

The Court: Has the government any rebuttal?
(There was a discussion off the record.)

The Court: The court will take a recess until two o'clock.

(Whereupon, at 12 o'clock noon, a noon recess was taken until 2 o'clock p. m. of the same day.) [49]

Afternoon Session

(Two o'clock)

The Court: You may proceed.

Mr. Winter: If the Court please, in order that there may be no misunderstanding, counsel seems to be a little confused about what was done in this matter.

We will offer in evidence the certified photostatic copy of the claim for refund, Form 843, for the \$732.22, which was filed, and refund allowed, which is the claim under the third affirmative defense.

The Court: Is there any objection?

Mr. DeGarmo: No, I have no objection. I have seen these.

The Court: Admitted.

(The document referred to was marked "Plaintiff's Exhibit No. 8" and received in evidence.)

Mr. Winter: And we admitted it by our reply.

The Court: Is there any rebuttal evidence?

Mr. Winter: Yes, your Honor. Counsel has handed me, and it appears in the record, a certain statement made to the referee in bankruptcy by myself and Mr. Grady, which I will agree can be marked as an exhibit for identification.

(The document referred to was marked
"Plaintiff's Exhibit No. 9" for identification.)

Mr. Winter: We will offer it, your Honor, if counsel has no objection.

Mr. DeGarmo: I have no objection.

The Court: What is that?

Mr. Winter: This is a transcript of the reporter's notes of the hearing before the Special Master on September [50] 18, 1935—September 28, 1935, and I want also the minutes of the 18th of September, 1935.

Mr. DeGarmo: I will give them to you, Mr. Winter.

Mr. Winter: I will ask that it be marked as one exhibit, because they follow in order.

I will ask to be sworn, if the Court please.

THOMAS R. WINTER

produced himself as a witness on behalf of the Government, being first duly sworn, testified as follows:

Mr. Winter: If the Court please, I might explain that Mr. Shucklin is engaged in the trial of another case at two o'clock.

The Court: All right.

Mr. Winter: My name is Thomas Winter.

Mr. DeGarmo: I will admit Mr. Winter's qualifications.

The Court: All right.

Mr. Winter: My name is Thomas Winter. I am special attorney, Bureau of Internal Revenue, and I have been since October 7, 1929.

The Court: Propound the questions, and counsel can object, if he likes.

Mr. Winter: Government's Exhibit 9 is a substantial statement of all agreements or understandings I had with Judge Grady relative to the claims of the United States before the Trustee in Bankruptcy.

Mr. DeGarmo: Just a moment, please. I will object to that. Exhibits 9 and 10 are transcripts of the record and [51] statements made before the Master at the time of the hearing. Judge Grady's testimony was that the agreement to which he referred was made in the court room, but not before the Master, and we further object to the question upon the ground that, as propounded, it is a leading question,

(Testimony of Thomas R. Winter.)

in the first place; and in the second place, it calls for the witness to dispute the record which he himself has introduced.

The Court: The objection will be sustained. Judge Grady's testimony was that this conversation was immediately preceding.

(The following questions were propounded by Mr. Winter and answered by Mr. Winter.)

By Mr. Winter:

Q. What time did you arrive in Yakima on September 18, 1935?

A. I arrived in Yakima a few minutes before the morning session at ten o'clock on *October 35*, because I was driving my automobile, and I left Seattle in time just to arrive there at that time.

Q. Did you have any conversation with Judge Grady on September 18, 1935, before the hearing?

A. I did not.

Q. Did you state to the Court substantially, the Referee, substantially as is set forth in Exhibit 9?

A. I did.

Q. Did you make any other representations other than those set forth therein to Judge Grady at any time? A. I certainly did not.

Q. Did you inform Judge Grady as to whether or not the claim for refund—I mean the claims, would be withdrawn?

A. I informed Judge Grady on several occasions that in view [52] of the order of Judge Webster,

(Testimony of Thomas R. Winter.)

whereby he directed the trustee to pay all of the withdrawal and gallonage taxes; that we would not know what part of the claim would be allowable and what would not, and that it was thought that the full amount of the tax would be paid in the withdrawal tax, and that, in my opinion, in the present case, I had some question as to the merits of the tax liability, and I would recommend the abatement of the balance if all the gallonage tax was paid. I made the same recommendation to the collector's office, which was the result of the letter of June 6. A copy of that letter was forwarded to my office.

Q. When was the last time you discussed the allowance or rejection of the government's claims, being the claim for \$500 and \$76, I believe?

A. I discussed those claims—I never discussed those claims with Judge Grady, because they were always continued because of the uncertainty of the \$9,000 claim. They only involved a question of law as set forth in this exhibit. There was no serious objection to them. I have spoken to Judge Grady as to the National Recovery Act, then declared unconstitutional; but that the tax was, while it was a part of that act, the unconstitutionality, as determined by the Supreme Court, did not affect the tax which was imposed under that act, and I was successful in convincing Judge Grady.

The Court: Just what was it that was said here just before the noon recess, I believe it was, with

(Testimony of Thomas R. Winter.)

reference to the claims which were recommended for allowance?

Mr. Winter: They were the claims recommended for allowance prior to the filing of the letter advising the clerk that the claim had been withdrawn. [53]

The Court: And you are speaking now of which claims?

Mr. Winter: I am speaking of the claims for \$500 and \$76.

The Court: All right.

Mr. Winter: Yes. Judge Grady, on September 28, 1935, at the hearing before the Special Master, recommended that the \$500 capital stock tax claim and the other \$76 tax claim be allowed to take priority under Section 64-A.

By Mr. Winter:

Q. Had the claim—the \$9,000 claim, been withdrawn at that time?

A. No. No notice had been given of that claim for abatement, which is Government's Exhibit 1. No such claim had been filed with the collector.

The Court: May I suggest that you perhaps should speak a little more slowly and a little more loudly. I imagine that you are talking not less than 250 or 300 words a minute.

Mr. Winter: Thank you, your Honor.

Q. When was the first time that you learned that there was any contention made that the \$500

(Testimony of Thomas R. Winter.)

and the \$76 claims were to be allowed because the government had withdrawn its proof of claim for the \$9,000 claim?

A. This morning in court.

Q. Was there ever anything said to you by Judge Grady that he would allow the claim of \$500 and the \$76 if you would withdraw the claim?

A. Nothing.

Q. What was the reason for withdrawing the \$9,000 claim, if you know? [54]

Mr. DeGarmo: Now, just a moment, if the Court please. The record will speak for itself.

The Court: Yes, I think so. That is a matter that would be disclosed by the record.

Mr. Winter: That is all.

The Court: Cross examine.

Cross Examination

By Mr. DeGarmo:

Q. Mr. Winter, do I understand you to say that you arrived in Yakima on the morning of September 18, 1935, and that you had no conversation with Judge Grady before you proceeded with the hearing?

A. I did not on September 18; I talked with him the Monday previous.

Q. You talked with him the Monday previous?

A. Yes.

Q. Now, I want you——

(Testimony of Thomas R. Winter.)

A. (Interposing) But not about the \$500 or the \$76 claim.

Q. Now, I want you to explain this to me:—

A. Yes.

Q. I am now reading from your Exhibit No. 9, in which you stated to the Special Master as follows:

“Now, will the Court continue the hearing on the Government \$9,000 claim until some later date, in order that the claim in abatement might be filed, and in all probability the claim will be withdrawn if the claim in abatement is allowed?”

The Master said, “There is just a possibility of that?”

To which you answered, “Well, it has developed [55] into more than a possibility, as I have advised Judge Grady”?

A. Yes.

Q. Now, when did you advise Judge Grady that it had developed into more than a possibility that the claim for abatement would be withdrawn, and that the claim was withdrawn?

A. I advised Judge Grady before we finished the hearing before Judge Webster in Spokane. I have always understood that the claim for \$9,000 would be withdrawn if the claim for the abatement was allowed, and it was not known how much

(Testimony of Thomas R. Winter.)

of the \$9,000 claim would be abated by the order of the court. By the order of the court, the trustee paid out practically all of the claim, with the exception of \$3,000.

Q. All right. And you went ahead and stayed on the matter personally right in the abatement of the claim, in view of the situation in this matter? A. That is right.

Q. But so far as the other two claims, we have two separate claims? A. Yes.

Q. And one of the others was the claim in the amount of \$500 for capital stock tax assessed under Section 3151, which Judge Grady filed, and the other one was for \$76.20? A. Yes.

Q. Those two claims were also mentioned at this hearing?

A. Yes, they are mentioned as separate claims.

Q. Then, am I to understand from your testimony that at this hearing before the Court on the 18th of September, 1935, that you had assured Judge Grady that this claim for \$9,000 [56] was going to be withdrawn?

A. That is all we talked about. We did not talk about the other claims?

Q. You did not?

A. We talked about the other claims, yes. We knew they would not be abated in the bankruptcy proceedings.

Q. You do not answer my question. The question was whether at the original hearing, which

(Testimony of Thomas R. Winter.)

was on the 18th of September, 1935, you had assured Judge Grady that the claim for \$9,000 would be withdrawn?

A. No, I never assured him——

Q. As a matter of fact, did you recommend that to the Internal Revenue Department?

A. Yes.

Q. You said it was to be withdrawn because they were getting the tax out of the order of the court?

A. The withdrawal of the tax—until it was determined, there was nothing to litigate.

Q. By the way, on that question, Mr. Winter, this morning several statements were made that the amount of tax which was paid out of the \$12,000 purchase price which Mr. Rovig paid was the amount of \$6,000. It is a fact, is it not, that the total tax which was paid out of the \$12,000 to the United States Government was \$9,171.62?

A. It is not a fact, the way you state it.

The Court: What was the amount paid?

The Witness: There was that amount paid for purchasing stamps, yes; but only \$5,000—\$5,200——

Q. I am asking you a question.

A. Well, I am trying to explain it. [57]

Q. I have asked the question whether the amount which was paid out of the purchase price of the \$12,000 was not \$9,172.60 in tax to the United States Government.

A. I don't know whether it was paid out of

(Testimony of Thomas R. Winter.)

the \$12,000. I know stamps were purchased in the amount of some \$9,000. Let's see that exhibit, Mr. Clerk.

(The clerk handed some papers to the witness.)

A. (Resumed) \$9,171.62 was paid. Of course, all of the tax which was paid by stamp was——

Q. Let's see if I understand this. Under the order this was sold for \$12,000?

A. That is right.

Q. Out of the purchase price, the government collected \$9,171.62 in tax, and they now want \$3,162.56 more as tax upon this same wine?

A. That is right. That was the total tax liability against that wine.

Q. So that I am to understand, then, that the government, out of the wine which it sold for \$12,000, wants more than \$12,000 for tax?

A. No, that is not right.

Q. That is what you are asking for, isn't it.

A. That is not so.

The Court: Just give these figures.

The Witness: There was assessed \$9,200 and some odd dollars in tax.

The Court: Do you have the actual figures there?

The Witness: Yes, your Honor. If I can get the claim for refund there—I mean the original exhibits.

(Counsel handed a paper to the witness.)

(Testimony of Thomas R. Winter.)

The Witness: There was assessed against the wine as of that date, \$9,387.21. That tax covered——

The Court: Now, then, the figures you mentioned previously were what?

The Witness: \$3,162.56, which is the tax on 10,541 barrels—gallons of mixed wine.

The Court: Proceed, Mr. DeGarmo.

By Mr. DeGarmo:

Q. Mr. Winter, you have stated that on the 28th day of July, 1935, Judge Grady recommended to the Special Master the allowance of the \$500 capital stock tax claim and \$76 stock tax claim?

A. Yes.

Q. Isn't it a fact that from this exhibit, this statement was made by you to the Court:

“Mr. Winter: With respect to the claim of the United States for nine thousand and some odd dollars, the trustee has duly filed a claim in abatement with the Collector of Internal Revenue seeking the abatement of the full amount covered by this claim”?

A. Yes.

Q. “and in view of the order of the court authorizing and directing the trustee to purchase and cancel stamps on the wine sold to R. D. Rovig, I am recommending to the Commissioner of Internal Revenue aforementioned claim be abated, in which event the claim will be withdrawn.

(Testimony of Thomas R. Winter.)

“It is, therefore, requested that an extension be granted of ten days in order to allow administrative action to be taken by the Bureau of Internal Revenue.

“The Master: Motion granted,” and immediately Judge [59] Grady said——

A. (Interposing) Then we finished with the \$9,000 and——

Q. I am just taking the transcript of the record. Then Judge Grady said, “The trustee recommends to the Master that the \$500 capital stock stamp tax claim, and the other \$76 stock tax claim be allowed to take the priority under 64-A”?

A. It was on——

Q. It was at that hearing that Judge Grady withdrew his objection and recommended the allowance of those two claims to the Special Master?

A. He did not make any allowance of those claims, because I was recommending the abatement of that claim.

The Court: Isn't that about the condition of the record?

The Witness: That is the way, if your Honor please, that I recall it. It would be the natural thing to check these claims up afterwards, but there was no representation made to Judge Grady.

The Court: Are you about through with the cross examination?

Mr. Winter: I think the exhibits speak for themselves, your Honor.

(Testimony of Thomas R. Winter.)

The Court: Very well.

Mr. Winter: That is all.

The Court: Do both sides rest?

Mr. Winter: No. I have one more witness, your Honor. I will call Mr. Trace. [60]

RUSSELL TRACE

was called as a witness by and on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name, please? A. Russell Trace.

Q. And what is your occupation, Mr. Trace?

A. Chief of the Miscellaneous Tax Division, Bureau of Internal Revenue.

Q. And with offices at Tacoma?

A. At Tacoma; yes, sir.

Q. On October 15, 1937, did you occupy—on October 15, 1937, you say that you occupied that office—that position? A. Yes, sir.

Q. Have you brought with you the original records—I mean the records of the Collector of Internal Revenue? A. I have.

Q. Showing the assessments and the abatement, if any, of any schedules having been submitted to

(Testimony of Russell Trace.)

the Collector of Internal Revenue of the tax here in question? A. Yes, sir.

Q. Will you hand them to me, please?

(The witness handed some cards to counsel.)

Mr. Winter: Mr. Clerk, may I have this marked for identification?

(The document referred to was marked "Plaintiff's Exhibit No. 11" for identification.)

By Mr. Winter:

Q. I will show you what has been marked for identification [61] "Plaintiff's Exhibit No. 11." Was that prepared under your supervision and direction? A. Yes, sir.

Q. What does that record show?

A. It shows the assessment list and the amount of the assessment, the amount paid and the amount credited and the amount outstanding.

Q. What is the amount outstanding on the collector's records at the present time?

A. Three thousand——

Mr. DeGarmo: Just a moment. The amount outstanding as of what time?

By Mr. Winter:

Q. It shows the amount of tax outstanding from the Coast Wineries at the present time, does it?

A. Yes, sir.

Q. Does it show any claims for abatement which have been filed? A. Yes, sir.

(Testimony of Russell Trace.)

Q. Does it show that any claims were paid?

A. Yes.

Q. It is a complete record of any action taken with respect to that assessment; is that true?

A. Yes, sir.

Mr. DeGarmo: Action taken by whom?

A. By the Commissioner of Internal Revenue, Washington, D. C.

Mr. Winter: I will offer in evidence "Plaintiff's Exhibit No. 11."

Mr. DeGarmo: I wish to make the same objection to [62] that which I made this morning, to the attempt to offer some evidence by a certified copy. It is our position that the government is bound by the record in the bankruptcy proceedings. Regardless of what the collector's records may show, the government is bound by the adjudication in the bankruptcy proceeding.

The Court: The ruling is reserved.

By Mr. Winter:

Q. I will show you "Defendant's Exhibit A-7." Will you state to the Court whose initials appear in the left-hand corner of that instrument?

A. I would say that is the initial—the initials of the one who dictated the letter. I would say that the typist——

Q. Who was that that dictated that letter?

A. It was Ethel Bloomquist.

(Testimony of Russell Trace.)

Q. She is not now in the office?

A. She is not in the office.

Q. What was her official position at that time?

A. She was a clerk—deputy clerk collector.

Q. I will ask you whether or not there was any record of the \$9,387.27 referred to on the first page of Claim No. 2 filed under date of June 7, 1935, about any abatement of that tax as of that date, or subsequent thereto.

Mr. DeGarno: Now, if your Honor please, that is an attempt to contradict by his testimony the letter which the Collector of Internal Revenue filed with Judge Webster in the bankruptcy proceeding, in which the definite statement was made that this claim had been abated, and acting upon that, the judge, the referee, or master says, "withdraw the claim," or said that it was withdrawn. [63]

The Court: Let's see it.

(Counsel handed a paper to the Court.)

The Court: Is there a copy of this letter in evidence?

Mr. DeGarmo: Yes, that is the copy.

Mr. Winter: That is a copy, your Honor, over our objection, as being merely a letter from the collector, and the abatement can only be made, under the statute, by the Commissioner of Internal Revenue.

The Court: I will reserve the ruling.

(Testimony of Russell Trace.)

By Mr. Winter:

Q. Tell us when that claim was filed.

A. The claim was dated September 19, 1935, and on March 15, 1937, the Commissioner adjudicated the claim by allowing \$6,224.65, and rejecting the \$3,162.56, amounting to a total of \$9,387.21, for which the claim was filed.

Q. Then I take it that on September 19, 1935, there was a claim for abatement received, which would be about eight days prior to the letter of October 15, 1935, and claim was pending on October 15, 1935, which your records show was forwarded to the bureau under what date?

A. Forwarded to the Bureau on October 14, 1935.

Q. Does it show the recommendation of the Collector?

A. The recommendation of the Collector?

Q. Yes.

A. I would have to read it to see.

Mr. Winter: I will withdraw that.

By Mr. Winter:

Q. The action was really in March—on March 15, 1935? A. Yes, sir. [64]

Q. And subsequent to that time you filed, or attempted to file, with the Referee in Bankruptcy a claim for the amount for which it had been rejected?

(Testimony of Russell Trace.)

Mr. DeGarmo: Now, just a minute. Whether he filed or attempted to file—he has asked the witness two questions in one.

Mr. Winter: I asked him whether he filed or attempted to file.

A. Well,——

Mr. DeGarmo: You cannot answer that question.

The Court: Just ask one question at a time.

By Mr. Winter:

Q. They forwarded to the Referee—they filed with the Referee a claim for refund in which——

Mr. DeGarmo: As to that, if the Court please, the record in the bankruptcy proceedings will speak for themselves.

The Court: Objection sustained.

Mr. Winter: Are the records in the bankruptcy proceedings here?

Mr. DeGarmo: It is here.

The Court: It is a question of when it was filed.

Mr. Winter: I think that is all.

Mr. DeGarmo: I do not desire to cross examine this witness, if your Honor please, because I do not want to waive my objection to any of his testimony.

The Court: If you cross examine him, I will allow you.

(Testimony of Russell Trace.)

Cross Examination

By Mr. DeGarmo:

Q. The only question I have, Mr. Trace, [65] is this: Did I understand your testimony that at the time the office of the Collector of Internal Revenue in Tacoma, the Clerk of the Superior Court, or the Clerk of the Federal Court in Spokane, stating that this claim had been abated, that there was nothing in the record of the Collector's office to substantiate that statement?

A. That is absolutely true; there was nothing.

Q. There was nothing?

A. No, sir. The intent of that letter was——

Q. I didn't ask you about the intent.

Mr. Winter: He can explain his answer.

By Mr. DeGarmo:

Q. There was nothing left whatever?

A. No, sir.

Mr. DeGarmo: That is all.

The Court: The next witness.

Redirect Examination

By Mr. Winter:

Q. What did you receive at that time?

Mr. DeGarmo: He said there was nothing there.

The Court: Yes. The objection is sustained.

Call your next witness.

Mr. Winter: That is all.

(Testimony of Russell Trace.)

The Court: Do both sides rest?

Mr. Winter: We rest.

Mr. DeGarmo: We rest.

The Court: I have some filed briefs handed to me this morning on my desk. Do you desire to brief the case?

Mr. Winter: We would like an opportunity to reply. We have not seen counsel's brief, and if a reply is necessary, [66] we desire to file a brief in reply.

The Court: I would like to have you brief your facts.

Mr. DeGarmo: I would like to speak orally on the fundamental——

The Court: You can brief your facts as fully as you may desire.

Mr. DeGarmo: That is satisfactory to me.

Mr. Winter: That is satisfactory to me.

(There was further discussion.)

The Court: Very well. If there is nothing else, the Court will adjourn until next Monday.

(Whereupon, at 2:42 o'clock p. m., the hearing in the above-entitled matter was adjourned.)

[Endorsed]: Filed Feb. 16, 1942. [67]

[Endorsed]: No. 10061. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Coast Wineries, Inc., a corporation, and United States Fidelity

and Guaranty Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed February 21, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10061

UNITED STATES OF AMERICA,

Appellant,

v.

THE COAST WINERIES, INC., a corporation,
and the UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD TO BE PRINTED

Comes now the appellant, United States of America, in compliance with Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit and states that upon the appeal it intends to rely upon the following points:

(1) That part of Finding of Fact No. IX made and filed in the District Court of the United States for the Western District of Washington, Northern Division, which purports to find that the claim of the United States covering the taxes sought to be recovered in the action on the bonds was withdrawn pursuant to an agreement between the attorney for the appellant and the attorney for the trustee to withdraw objections to the other claims filed in that proceeding, is erroneous and not supported by and is contrary to the evidence produced at the trial of the above-entitled cause.

(2) That part of the Finding of Fact No. X made and filed by the District Court of the United States for the District of Washington, Northern Division, which purports to find that the claim of the United States had been withdrawn under the circumstances and pursuant to an agreement set forth in Finding of Fact No. IX, is erroneous and not supported by and is contrary to the evidence produced at the trial of the above-entitled cause.

| (3) That Finding of Fact No. XI is erroneous and is not supported by and is contrary to the evidence produced at the trial of the above-entitled cause.

(4) That Conclusions of Law Nos. I, II and III, made and filed by the District Court of the Western District of Washington, North-

ern Division, and each thereof, are erroneous and are not supported in law and are contrary to the evidence produced at the trial of this cause.

(5) That the District Court for the Western District of Washington, Northern Division, erred in entering its judgment of July 7, 1941, dismissing the above-entitled action with prejudice.

(6) That the District Court for the Western District of Washington, Northern Division, erred in failing to find that the United States of America, appellant, was not precluded from maintaining the above-entitled action on the assessment because of the disallowance by the District Court for the Eastern District of Washington of the claim filed by the United States of America, appellant, in the bankruptcy estate of the principal on the bond based upon said assessment.

(7) That the District Court for the Western District of Washington, Northern Division, erred in concluding that the order of the District Court for the Eastern District of Washington expunging and disallowing the claims filed in the bankruptcy estate of the principal on the bond was a judgment on the merits and was *res judicata* in this action on the bonds.

(8) That the District Court for the Western District of Washington, Northern Division,

erred in its failure to make and enter Findings of Fact, Conclusions of Law and Judgment for the United States of America, appellant, against the appellee, United States Fidelity and Guaranty Company, in the amount for which the action was brought and for costs of suit herein.

Appellant further designates for consideration of the foregoing points the entire certified transcript.

Dated this 24th day of Feb., 1942.

J. CHARLES DENNIS,
United States Attorney.

GERALD SHUCKLIN,
Assistant United States
Attorney.

THOMAS R. WINTER,
Special Assistant to the Chief
Counsel, Bureau of Internal
Revenue.

Copy of within Received 2-24-42.

ALLEN, HILEN, FROUDE, & DeGARMO,
Attorneys for U. S. F. & G. Co.

[Endorsed]: Filed Feb. 27, 1942. Paul P. O'Brien,
Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

vs.

THE COAST WINERIES, Inc., a corporation, and
UNITED STATES FIDELITY AND GUARANTY
COMPANY, a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF FOR APPELLANT

JOSEPH LAWRENCE,
*Director, Bond and Spirits Division,
Department of Justice.*

BENJAMIN H. PESTER,
Chief, Bond and Tax Section.

J. CHARLES DENNIS,
United States Attorney.

JULIAN D. SIMPSON,
Chief, Compromise Section.

GERALD SHUCKLIN,
Assistant United States Attorney.

THOMAS R. WINTER,
General Counsel Representative.

OFFICE AND POST OFFICE ADDRESS:
1021 UNITED STATES COURT HOUSE,
SEATTLE, WASHINGTON.

FILED

MAY 13 1942

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IN THE
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UNITED STATES OF AMERICA,

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vs.

THE COAST WINERIES, Inc., a corporation, and
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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF FOR APPELLANT

STATEMENT OF THE PLEADINGS,
FACTS AND PROCEDURAL STEPS
DISCLOSING JURISDICTION

This case arises on appeal from decision (R. 51-58) and judgment entered by the District Court of the United States for the Western District of Washington, Northern Division (R. 71-72).

JURISDICTION OF DISTRICT COURT

This appellant, The United States of America, as alleged, was complainant in the Court below (R. 2), under authority of Sec. 41, Title 28 U.S.C.

The Coast Wineries, Inc. was a corporation doing business under the laws of the State of Washington, with the principal place of business at Yakima, Washington, and the United States Fidelity and Guaranty Company is a corporation organized under the laws of the State of Maryland, duly authorized to do a general surety business in the State of Washington (R. 2-3).

The complaint was filed by the United States Attorney for the Western District of Washington on behalf of the United States of America, appellant, for the recovery of \$3,162.56 under two bonds executed by the defendants named, to the United States of America (R. 5-9) as set out in the complaint.

JURISDICTION OF THIS COURT

The appellee, United States Fidelity and Guaranty Company, defendant below, filed an answer and thereafter an amended answer to the complaint admitting certain allegations in the complaint and denying

others (R. 28-46). They also alleged a counterclaim or set-off, to which this appellant filed a reply (R. 46-51). A trial was had on May 7, 1941, to the Court without a jury (R. 81), and judgment was entered on July 7, 1941, against the appellant dismissing the action with prejudice (R. 71-72). Notice of appeal was filed in the United States District Court for the Western District of Washington, Northern Division, on October 6, 1941, (R. 73), and a motion for extension of time to file the transcript of record was filed in this Court (R. 74). Motion was granted on February 5, 1942 (R. 76-77). Transcript of Record was filed February 18, 1942 (R. 79-80). Jurisdiction of this Court is under Sec. 128(a) of the Judicial Code, as amended by the Act of February 13, 1925, (Title 28 U.S.C. Sec. 225).

STATEMENT OF THE CASE

QUESTIONS PRESENTED

Five questions are raised by this Appeal:

1. Is the finding of fact, numbered IX, made by the District Court, that the \$9,387.21 claim, was withdrawn pursuant to an agreement between the attorney for the appellant and the attorney for the trustee in consideration of the withdrawal of objections to the other claims by the trustee, erroneous?

2. Is the appellant estopped to assert a claim upon the bonds against the United States Fidelity and Guaranty Company?
3. Is the order of Judge J. Stanley Webster, dated November 12, 1937, in the bankruptcy proceeding of the Coast Wineries, Inc., res judicata between plaintiff below and the defendant United States Fidelity and Guaranty Company?
4. Is the claim for \$732.22 paid to the trustee as alleged by the appellee a proper set-off in this bond suit against the surety for the bankrupt?
5. Did the District Court err in dismissing this action?

STATUTES INVOLVED

“SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS. (Sec. 3770, I.R.C.—Sec. 3220 R.S.) parenthesis ours.

(a) TO TAXPAYERS.—

(1) Assessments and collections generally.—Except as otherwise provided by law in the case of income, estate, and gift taxes, the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.”

STATEMENT OF FACTS

This is a suit by the United States of America against the United States Fidelity and Guaranty Company on two winemakers' bonds executed by the Coast Wineries, Inc., as principal and the United States Fidelity and Guaranty Company, as surety, which said bonds guaranteed payment to the United States of America of certain taxes incurred by the Coast Wineries, Inc., in the making and selling of wines at 313 West C Street, Yakima, Washington (R. 5-8). The complaint alleges a breach of the conditions of the bonds through the failure to pay taxes in the sum of \$3,163.56 as evidenced by an assessment on the books of the Collector of Internal Revenue at Tacoma, Washington (R. 4). The assessment of this tax is established by the record and was so found by the Court in the case at bar (R. 61).

The defendant appellee, United States Fidelity and Guaranty Company, filed an answer to the complaint, and later filed an amended answer to said complaint, wherein it admits the execution of the bonds, but denies that the bonds were in effect at the time the Coast Wineries, Inc, incurred the tax, and denies that an assessment for taxes at 30c per gallon on 10,541 proof gallons of wine was entered on the Col-

lector's books, and alleges its refusal to pay the taxes claimed by the United States of America (R. 29-30).

The amended answer further alleges that the Coast Wineries, Inc. was adjudicated a bankrupt and a claim was filed by the Collector of Internal Revenue in the bankruptcy proceedings for the sum of \$9,387.21, and that pursuant to a claim for abatement of said tax, the claim was withdrawn on October 15, 1935, (R. 32) by letter of the Collector of Internal Revenue (R. 41). That, thereafter on April 15, 1937, a claim in the sum of \$3,162.56 was filed with the United States Clerk for the Eastern District of Washington, Southern Division, in the matter of the bankruptcy of the Coast Wineries, Inc., and that said claim was disallowed and rejected by the trustee in bankruptcy; that said claim came on for allowance or disallowance upon the report of the Special Master before the Honorable J. Stanley Webster, Judge of the United States District Court for the Eastern District of Washington, Southern Division, on October 5, 1937, (R. 33); that the United States was represented by an Assistant United States Attorney and after a hearing an order was entered on November 12, 1937, denying and expunging said claim (R. 34), and that no appeal was taken (R. 34) from said order (R. 44-45).

The amended answer further alleges, the death of one of the surety's indemnitors (R. 35) and a set-off and counterclaim for \$737.22 (R. 36-37).

The appellant filed a reply admitting that the claim sued for is the identical amount of taxes set forth in the claim filed in the bankruptcy matter but denied the other allegations, and denied that a hearing was had on said claim, alleging that the claim was disallowed and expunged on oral objection of the trustee to the filing of the claim (R. 48) for the reasons stated in the order (R. 45).

The pleadings and evidence of record tend to show that the Coast Wineries, Inc., filed a petition in bankruptcy for reorganization under Section 77-B of that Act, and the United States Collector of Internal Revenue for the District of Washington filed three claims in said bankruptcy proceedings, namely; one for \$501.67, another for \$9,387.21 and a third claim for \$76.20 (R. 94). The plaintiff, appellant herein, objected to the introduction of this testimony (R. 94) and the Honorable Judge reserved his ruling on the question (R. 95-97).

Over objection of appellant's counsel, Thomas E. Grady was permitted to testify regarding a conversation he had had with Thomas Winter, Special At-

torney for the Internal Revenue Bureau, to the effect that the objections of the trustee to the \$501.67 and the \$76.20 claims would be withdrawn if the United States Government would withdraw its claim in the sum of \$9,387.21 (R. 100-103), and that thereafter the abatement claim was allowed for \$6,224.65 (R. 109). Thomas R. Winter took the witness stand and denied any conversation or agreement had with Thomas E. Grady regarding the two smaller claims (R. 137-138). The Special Master's report shows that the \$9,387.21 claim was disallowed and expunged and the other two claims were allowed (R. 65), and said report was approved by the Court (R. 66).

On or about April 13, 1937, the Collector of Internal Revenue filed with the Clerk of the Court in the bankruptcy matter of the Coast Wineries, Inc. a claim for \$3,162.56, which said claim was a part of, and had originally been included in the \$9,387.21 claim (R. 54 and 67). On November 12, 1937, this claim was expunged and disallowed by the District Court in the bankruptcy proceedings because it "was and is a part of the original claim of \$9,387.21" (R. 54).

SPECIFICATIONS OF ERROR AND POINTS TO BE URGED

1. The Court erred in finding as a fact, that the \$9,387.21 claim filed in the bankruptcy reorganization proceedings was withdrawn pursuant to an agreement between the attorney for the Government and the attorney for the trustee.

2. The Court erred in concluding, as a matter of law, that the appellant is estopped to assert the claim, sued upon, against the United States Fidelity and Guaranty Company.

3. The order of Judge J. Stanley Webster, dated November 12, 1937, and the other proceedings had in the bankruptcy matter of the Coast Wineries, Inc. is not res judicata.

4. The claim of the Appellee for \$732.22, the amount paid to the trustee, is not a proper set-off in the suit on the bond.

5. The Court erred in dismissing the suit and not entering judgment for the amount sued for by the United States of America.

SUMMARY OF ARGUMENT

1. Under the pleadings filed no issue was set up regarding an agreement as the basis for the with-

drawal of the \$9,387.21 claim originally filed in the bankruptcy reorganization proceedings, and the evidence introduced over the objections of appellant's counsel erroneously forms the basis for the Court's finding of fact, that there was an agreement.

2. The Commissioner of Internal Revenue is the only Government officer who has the authority to abate a tax and bind the United States of America in the matter of assessed taxes and, therefore, any agreement which any special attorney of the Internal Revenue Bureau may or may not have made, would not and could not constitute an estoppel.

3. The \$9,387.21 claim was withdrawn by the Collector of Internal Revenue from consideration in the bankruptcy reorganization matter and the \$3,162.56 claim was part of the \$9,387.21 claim and, was filed as a new claim in the bankruptcy matter of the Coast Wineries, Inc., after the Court had approved the report of the Special Master in which the larger claim had been expunged and disallowed. The smaller claim was therefore a non-provable claim before the Special Master and its disallowance is not *res judicata*.

4. The counterclaim of the appellee for \$732.22 arose out of a refund paid to the trustee in bankruptcy for tax stamps purchased after the Coast

Wineries, Inc., became a bankrupt and is, therefore, not allowable as a set-off in the suit against the surety on the bonds executed by the bankrupt taxpayer for payment of taxes incurred prior to the bankruptcy.

5. The doctrine of estoppel and res judicata have no application to what transpired in the bankruptcy proceeding as appears in the record and the appellant can, therefore, maintain its suit on the bonds.

ARGUMENT

I.

THE COURT ERRED IN FINDING AS A FACT THAT THE \$9,387.21 CLAIM FILED IN THE BANKRUPTCY REORGANIZATION PROCEEDINGS WAS WITHDRAWN PURSUANT TO AN AGREEMENT BETWEEN THE ATTORNEY FOR THE APPELLANT AND THE ATTORNEY FOR THE TRUSTEE.

In the trial of this case the Court, over objection of the plaintiff's counsel (R. 94), permitted Judge Grady, who had been the attorney for the trustee in bankruptcy, to testify in effect that he and Mr. Winter, attorney for the Government, discussed the merits of these claims, and that it was agreed that the objections of the trustee to claims numbered 1 (\$501.67) and 3 (\$76.20) would be withdrawn, since the claim

of \$9,387.21 was to be withdrawn by the United States of America. Mr. Winter's testimony in the Court below not only denies any such agreement, but even the discussion.

Based upon this testimony, the Court found as a fact, "pursuant to an agreement by the attorney for the plaintiff herein and the attorneys for the trustee in bankruptcy of the Coast Wineries, Inc. the trustee withdrew his objections to the claims of \$501.67 and \$76.20, and the \$9,387.21 was withdrawn by the Government as evidenced by written notice from the Collector of Internal Revenue." (R. 64).

The amended answer of the appellee, United States Fidelity and Guaranty Company, does not allege any such agreement, and under the allegations set out in the pleadings such question of fact was not properly before the Court.

The amended answer of appellee alleges the withdrawal of said claim in the bankruptcy reorganization proceedings, together with the documentary evidence relating to the withdrawal of said claim, and the order of the Honorable J. Stanley Webster, United States District Judge for the Eastern District of Washington, dated November 12, 1937.

The testimony of Thomas E. Grady (R. 92-119), which forms the basis of the finding of fact by the lower Court, that such agreement was entered into, was objected to by the appellant (R. 94) and the Court reserved its ruling on this objection (R. 95).

The defendant not having alleged an agreement as the basis for the withdrawal of the \$9,387.21 claim, but having alleged that the order of the Honorable Judge Webster, dated November 12, 1937, was an adjudication of this claim, should not have been allowed to assert such agreement at the trial. We submit, therefore, that all of the testimony introduced relating to the proceedings had in the bankruptcy reorganization matter as to the reason for the withdrawal of the \$9,387.21 claim was irrelevant and immaterial and should have been ruled out by the Court.

Parties must confine their proof to the pleadings, *Strauss v. J. M. Russell Company*, 85 Fed. 589-592. In *Oklahoma Gas and Electric Company v. Bates Expanded Steel Truss Company*, 296 Fed. 281-283, the Court said: "Turning from definitions of the terms to the rules pertaining to the admission of evidence, we find that a most fundamental rule is that evidence offered must correspond with the allegations and must be confined to the points in issue. *Greenleaf on*

Evidence par. 51. A statement of a witness is not relevant unless it touches upon the issue which the parties have made by their pleadings. *Platner v. Platner*, 78 N. Y. 90-95."

The finding of fact that the claim was withdrawn *pursuant to such an agreement* is erroneous and not warranted by the pleadings and evidence relative to this case.

Furthermore, the notice of withdrawal sent to the Clerk of the Court shows upon its face that the claim was withdrawn upon the recommendation of the District Supervisor of the Alcohol Tax Unit (R. 41), and the testimony in the case (R. 153) shows that the Collector had no authorization in his office at the time. It must be here remembered that the Commissioner of Internal Revenue alone is the official authorized by statute to either assess or abate taxes of (Sec. 3770 I.R.C.) this character. Therefore, neither the District Supervisor nor the Collector of Internal Revenue had any right or authority to bind the Commissioner of Internal Revenue at any stage prior to his final action and notification to his field subordinate.

II.

THE COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE APPELLANT WAS ESTOPPED TO ASSERT THE \$3,132.56 CLAIM SUED UPON, AGAINST THE U. S. FIDELITY AND GUARANTY COMPANY.

Aside from the question of estoppel by judgment, (*res judicata*), the United States is not otherwise estopped by any alleged actions of its officers from now recovering judgment for the amount equal to the taxes unpaid by the Coast Wineries, Inc., and thus a charge against the appellee, the United States Fidelity and Guaranty Company.

As stated in point I, nowhere in the pleadings either the complaint of the United States (R. 2-9), or in the answer (R. 10-27), or the amended answer, (R. 28-46) or in the reply of the Government (R. 46-51), is any mention of any alleged agreement by Government counsel with the trustee or his attorney concerning the withdrawal of the original \$9,387.21 tax claim (R. 39-40), or that such tax claim would be withdrawn if the objections by the trustee to the payment or two other small tax claims, to wit: \$76.20, documentary tax, and \$501.67 capital stock tax, claims for which had also been filed by the Collector with the Special Master (R. 52-62), were with-

drawn. Therefore, since issue could not be, and was not joined, the District Court erred in admitting over the objection of Government Counsel any testimony or evidence concerning such alleged agreement. The Court further erred in permitting testimony regarding the claims filed with the Referee in Bankruptcy for the \$76.20 and \$501.67 above mentioned (R. 94 etc.). Consequently, the District Court further erred in concluding there was such agreement between the attorney for the Government and the attorney for the Trustee in Bankruptcy (R 53), and in the Findings of Fact and Conclusions of Law (R. 64) to like effect. This was clearly prejudicial to the Government's case, especially since in part the Court's decision was based on estoppel, otherwise than by *res judicata* (R. 70).

Even admitting all the facts alleged by defendant in its amended answer, and those established by the record of testimony heard in the District Court in the instant case, such facts could not and did not establish estoppel, so as to prevent an action to recover a debt due the United States. The only officer of the United States authorized by statute to finally pass on claims for abatement of taxes and refund is the Commissioner of Internal Revenue (Section 3770 I.R.C.). This, the Trustee in Bankruptcy well knew, or should have known, and with this knowl-

edge the defendant, appellee in the instant suit, namely, the United States Fidelity and Guaranty Company, is therefore chargeable. As was stated in *Schafer v. Helvering*, 83 F. (2d) 317;

“Wrongs between man and man, which shock the conscience and justify the intervention of a Court of Equity, cannot affect or prejudice the sovereign in the right to demand the full measure of the statute. Whoever deals with the Government does so with notice that no agent can, by neglect or acquiescence, commit it to an erroneous interpretation of the law.”

The United States is not bound by unauthorized acts of its agents. Thus in *Alkan v. Bean*, Fed. Cas. No. 202, cited with approval in *U. S. v. Rizzo*, 297 U. S. 530, the court said in a really hardship case;

“ * * * The lien in favor of the United States *could not be* waived or affected by any statements made by the Collector or his deputy, to the complainant, Alkan, to the effect that the government had no claim against the property, and that there were no unpaid taxes thereon. No such statements or representations could estop the Government from asserting any claim (it actually had) or any lien existing in its favor for unpaid taxes * * *. *If such representations or statements were made, they could not bind the Government or effect its rights.* * * *” (Italics ours)

So, also to the effect that the United States is not bound or estopped by the acts of its officers and agents in entering into an agreement, or arrangement to do

or cause to be done what the law does not sanction or permit: *Wibur Nat. Bank v. U. S.* 294 U. S. 120, 79 L. Ed. 798; and *Utah Power and Light Co. v. U. S.* 243 U. S. 289, 61 L. Ed. 791. So, also, the Court concluded in *Utah v. U. S.* 284 U. S. 534, 76 L. Ed. 469, (a case where a land patent had issued on representations of certain citizens that the land was agricultural, whereas it was later ascertained by the United States to be mineral), that statements made by a Special Assistant Attorney General in a conversation with a State Official, could not constitute estoppel. Nor could a mistake of Government officers in construing a reservation in a land grant, establish estoppel, *Dubuque & S.C.R. Co. v. Des Moines Valley R. Co.*, 109 U.S. 329, 27 L. Ed. 952 And, further, where statements were admittedly made by Departmental Officers to the effect that a claim would be allowed, or had been certified favorably to the auditing office, the Court notwithstanding found no ground for estoppel against the United States. *Christie-Street Co. v. U. S.*, 129 F. 506, aff. 136 F. 326. So, too, the Collector of Internal Revenue had no authority to advise a taxpayer that he would not be required to pay a special tax, *Brabham v. Cooper*, 9 F. Supp. 904. Also, where an officer stood by and permitted repairs to be made of

a seized vessel, the United States was not estopped to assert its prior claim, *La Mascotte* 6 F. Supp. 695.

Thus, the general rule is that the United States is not bound by the unauthorized acts or statements of its agents.

McDonald v. U. S., 89 F. (2d) 126, Cert. denied 301 U. S. 697;

U. S. v. Norton, 77 F. (2d) 731.

And finally the case of *Royal Indemnity Co. v. U. S.*, 313 U. S. 289, seems in point regarding estoppel. There a Collector of Internal Revenue was paid by a bonding company the full amount of the tax for which the bond was liable (the bond in the instant case guarantees payment of taxes also) and surrendered the bond to the bonding company and consented to its termination. Thereafter the Government sued for interest. The Supreme Court sustained the Government's claim. The Court held that the Collector was a subordinate officer and that, while the Collector was authorized to accept the bond, his action in surrendering and terminating the liability on the bond was not authorized and, therefore, not binding on the United States. The Court said:

"Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV 3, Cl. 2. Subordinate officers of the United States

are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. (Citing cases) Collectors of internal revenue are subordinate officers charged with the ministerial duty of collecting the taxes. (Citing cases) There is no statute in terms authorizing them to remit taxes, to pass upon the claims for abatement of taxes or to release any obligation for their payment. Only the Commissioner, with the consent of the Secretary of the Treasury, is authorized to compromise a tax deficiency for a sum less than the amount lawfully due. (Citing cases)

“There is thus no basis in the statutes of the United States for implying an authority in a collector to release a bond for the payment of the tax which the Commissioner alone is permitted to reduce by way of compromise when the Secretary of the Treasury consents. *Heinemann Chemical Co. v. United States*, *supra*, and *Brewerton v. United States*, Ct. Cl., 9 F. Supp. 503, to the contrary, plainly rest upon a misapplication of the ruling in *United States v. Alexander*, 110 U. S. 325, 4 S.Ct. 99, 28 L.Ed. 166, which sustained the release of a bond for taxes by the Secretary of the Treasury which had been specially authorized by an Act of Congress.”

Therefore, it is respectfully submitted that any alleged actions by Government officers contrary to their actual authority did not, and could not, constitute estoppel as barring the right of the United States in this action.

III.

THE ORDER OF JUDGE J. STANLEY WEBSTER, DATED NOVEMBER 12, 1937, AND THE OTHER PROCEEDINGS HAD IN THE BANKRUPTCY MATTER OF THE COAST WINERIES, INC. IS NOT RES JUDICATA.

The record discloses that the \$9,387.21 claim originally filed in the bankruptcy reorganization proceedings was withdrawn (R. 45 and R. 53). The Special Master made his report to the District Judge as follows:

“Claim No. 69 filed by the United States Collector of Internal Revenue in the amount of \$9,387.21 has been withdrawn (Trustee’s Exhibit J).

This claim represented a tax on distilled spirits assessed under Sections 3244 and 3176 of the Revised Statutes and under the Liquor Taxing Act of 1934, the tax was abated under date of October 15, 1935.” (R. 65).

This report was approved by District Judge J. Stanley Webster on December 21, 1936 by Memorandum Opinion (R. 66).

Thereafter on April 15, 1937, the United States of America filed a new claim in the sum of \$3,162.56 with the United States Clerk in the matter of the bankruptcy of Coast Wineries, Inc. (R. 32 and R. 67). On or about October 5, 1937, the matter of the claim

of \$3,162.56 came on before the Court for disallowance upon the oral motion of the trustee in bankruptcy (R. 54), and on November 12, 1937, by order of Judge J. Stanley Webster, the said claim was expunged and disallowed (R 55) for the reason that this claim "was and is a part of the original claim of \$9,387.21 which was filed by the Collector of Internal Revenue for the District of Washington on or about February 28, 1935, and which claim the said Collector of Internal Revenue advised the Special Master in Chancery by letter of October 15, 1935, was abated on his records and thereby withdrawn, and it appearing that the said Special Master has disallowed and expunged said claim in his report (\$3,162.56) to which the exceptions were taken by the claimant, and which report to that extent has been approved by this Court in its memorandum decision on file herein." (R. 54).

From the above, it is definitely shown that the Special Master expunged the \$3,162.56 claim from the record because it was and is a part of the \$9,387.21 claim which had been previously withdrawn and expunged from the record, and so reported to the District Court, and which said report had been approved by the District Court and the claim expunged. It is obvious that neither the \$9,387.21 claim, nor the \$3,-

162.56 claim, which was a part of the \$9,387.21 claim, were ever considered on their merits, either by the Special Master or by the Court. The \$9,387.21 claim was withdrawn, and the \$3,162.56 claim disallowed and expunged, because it was a part of the \$9,387.21 claim which had been previously withdrawn and for that reason expunged. No estoppel by record can be invoked where the allegations or recitals did not conclude the pleader in the prior proceedings, as where the action was discontinued or dismissed without a decision on the merits. *Owensboro v. Waterworks*, 243 U. S. 166.

The decisions are clear that both in bankruptcy proceedings and in other court proceedings the plaintiff may withdraw its claim or action without prejudicing further action to enforce the collection of the obligation providing that the defendant will not be prejudiced other than by defending a subsequent action. See:

Jones v. Sec. Ex. C. 298 U. S. 1, *Detroit v. Detroit City Ry.* 55 Fed. 569 and *Ex Parte Skinner and Eddy Corp.* 265 U. S. 86.

In the last mentioned case the Court stated,

“ * * * The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons, or may not have given the real ones, can not affect his right.

The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs, is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek an affirmative relief, and he would be prejudiced by being remitted to a separate action. * * ”

It may be noted that in bankruptcy matters, rules of law and equity are applicable. See also *Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.* 121 Fed. 1015. Other cases may be cited substantiating the principle of permitting withdrawal of claims and their subsequent reassertion in a new proceeding.

The correct ruling, for the determination of whether the disallowance of a claim in bankruptcy is res judicata has been laid down in *United States v. American Surety Company of New York*, 56 Fed. (2d) 734, (C.C.A. 2), where the Court said:

“It may also be conceded that the allowance or disallowance of a claim in bankruptcy should be given like effect as any other judgment of a competent court, in a subsequent suit against the bankrupt or any one in privity with him. * * * But the distinction must be noted between disallowance of a claim because the creditor had a non-provable debt and disallowance because he had no debt at all. Disallowance on the former ground decides nothing as to the merits of the claim.”

To like effect see *Lesser v. Gray* 236 U. S. 70.

In the case at bar the Court found in its find-

ings of fact that there was an assessment for \$3,-162.56 and the assessment of the tax was not controverted. The decision was rendered solely on the basis that the new claim as filed being a part of the \$9,-387.21 claim expunged, was not subsequently provable in the bankruptcy proceedings.

In the case of *Bowers, etc. v. American Surety Company*, 30 Fed. (2d) 244 (writ of certiorari denied, 279 U. S. 865), bond was given, pending claim for an abatement of the tax assessment, guaranteeing payment of the tax if the claim for abatement was refused. Principal was then declared bankrupt, and upon the disallowance of the claim for abatement, and the refusal of the Government to file a claim against the bankrupt estate, the surety in the name of the Government, under 11 U.S.C.A. Section 93, filed the claim. Same was disallowed by the Bankruptcy Court. The surety, upon being sued under its bond for the tax, contended the foregoing action created equities forbidding recovery. The court said:

“Moreover, the issues decided by the Bankruptcy Court were irrelevant in any event; they concerned, and could concern, only the question of whether the tax had been properly assessed, not whether it had been assessed at all.”

The suit, in this case, predicated upon the bond executed by the United States Fidelity and Guaranty

Company, guaranteeing that "the said principal shall well and truly pay all the taxes due on said wine at the time and in the manner required by said laws and regulations," must be distinguished from a suit for taxes and considered as a suit on a contract for debt.

U. S. v. Barth Co., 279 U. S. 370;

Gulf State Steel Co. v. U. S. 287 U. S. 32;

Gray Motor Co. v. U. S. 16 F (2d) 367;

U. S. v. Wyoming Central Association, 70 F (2d) 869.

The decision of the Bankruptcy Court, therefore, cannot operate to bar recovery of the liability under the bond.

The \$9,387.21 claim having been expunged by the Court in its final order in the bankruptcy proceeding, and the new claim being a part thereof, and no motion having been made to the Court to reinstate the \$3,162.56 portion as a part of the \$9,387.21, reported by the Collector as having been abated in error, the Special Master could not and did not consider the \$3,162.56 on its merits, nor did the Court pass upon the merits of this new claim for \$3,162.56, according to the findings in the record, because the same was a part of the \$9,387.21 claim already expunged by it.

It is conceded, if the action by the Special Master and by the District Court in expunging the claims for \$9,387.21 and \$3,162.56 respectively, had been conclusive on the Government, the matter would have been res judicata. See:

Johannessen v. U. S. 225 U. S. 227, 56 L. Ed. 1066 and *Southern Pacific Railway Co. v. U. S.* 168 U. S. 1, 42 L. Ed. 355.

However, as in the case at bar the disallowance of a smaller claim because of the withdrawal and expunging of a larger claim, of which the smaller claim was part, does not decide the merits of either claim or constitute res judicata. Thus, it is clear that the taxpayer was not relieved from its liability for the tax under these circumstances. Since the claim was withdrawn, the decision in the matter of the bankruptcy still left the Government with its right to proceed to collect the amount actually due under the bond. In other words, the situation was that there was no provable claim before the Bankruptcy Court which could have been allowed and the discharge of the estate in bankruptcy does not conclude the Government from now alleging and collecting the obligation.

IV.

THE CLAIM OF APPELLEE FOR \$732.22, THE AMOUNT PAID TO THE TRUSTEE, IS NOT A PROPER SET-OFF IN THE SUIT ON THE BONDS.

We turn now to the claim by the appellee in its amended answer (R. 36-37), and denied by the United States in its reply (R. 49-50), that appellee was entitled to a set-off of \$732.22 of the amount chargeable to the taxpayer (Coast Wineries, Inc.) and consequently the appellee, United States Fidelity and Guaranty Company. This by reason of the fact that the United States refunded this sum to the Trustee in Bankruptcy when the tax for \$3,162.56 was outstanding and unpaid by the Coast Wineries, Inc.

While no point concerning this has been made on appeal and the District Court was silent concerning same in its decision, findings of fact and conclusions of law and in the judgment entered by it, the matter may become of importance should this honorable court reverse the District Court in its action in dismissing the Government's suit. It is submitted that if such decision is reversed an order should issue from this Honorable Court instructing the District Court to enter judgment for the United States.

The \$732.22 was an amount paid by the Trustee for wine tax stamps to be cancelled when certain wine

was sold by the Trustee in the Bankruptcy proceedings. The Trustee had overestimated the amount of wine tax stamps necessary for such wine and had purchased an excess of stamps in the amount of \$732.22. The Trustee surrendered these stamps for cancellation and requested to be reimbursed for these unused stamps. The Comptroller General of the United States allowed such claim and refused to use this amount as set-off against the tax debt due from the Coast Wineries, Inc. since the unused stamps had been purchased by the Trustee. The Commissioner concluded, and it is believed this court will take judicial notice that this conclusion was correct and that money due the Trustee, which was property legally belonging to the bankrupt estate, could not be set-off against the tax liability of the Coast Wineries, Inc., the bankrupt. Thus, the United States Fidelity and Guaranty Company, appellee is not entitled to set-off for that amount.

V.

THE COURT ERRED IN DISMISSING THE
SUIT AND NOT ENTERING JUDGMENT
FOR THE AMOUNT SUED FOR BY THE
UNITED STATES OF AMERICA.

The reason for the dismissal of this suit by the lower Court was based upon its finding of fact that there was an agreement between the attorneys for the

trustee in bankruptcy and Mr. Winter, Attorney for the Government, which resulted in the withdrawal of the original \$9,387.21 wine tax claim, coupled with the understanding that the trustee would withdraw his objection to the two smaller claims, and that they would be allowed in the Special Master's report. We maintain this finding of fact was erroneous and not justified by the relevant and admissible evidence properly before the Court and consequently the conclusion of law that the order of Judge Webster, expunging and disallowing the lesser claim, was an adjudication upon the merits, is erroneous.

As herein before shown in the discussion of other points, the smaller claim was not properly before the Special Master or the Court and, therefore, the adjudication could not be on the merits, nor could it be conclusive on the United States of America. It is therefore respectfully submitted that the order of dismissal was erroneous.

CONCLUSIONS

1. From the above it is submitted that the decision of Judge Webster in the bankruptcy proceeding was not *res judicata*.

2. That the action of the officers in connection with this matter, properly in the record, does not constitute estoppel.

3. That the assessment of the tax and proof thereof in the record is *prima facie* evidence of the amount due from the bonding company and is not contradicted by the evidence, and that said tax remains outstanding and unpaid.

U. S. v. United States Fidelity & Casualty Co.,
221 F. 27;

U. S. v. Fidelity & Casualty Co., 115 F. (2d) 475.

4. That the appellee, the United States Fidelity and Guaranty Co. is not entitled to a set-off for an amount equal to the wine tax stamp refund which was made to the trustee, and

5. That the order of the District Court should be reversed and set aside and instructions given by

this Court that a judgment be entered by the District Court in favor of the United States for the amount of this suit.

May, 1942.

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THOMAS R. WINTER,
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IN THE
United States
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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

vs.

THE COAST WINERIES, Inc., a corporation, and
UNITED STATES FIDELITY AND GUARANTY
COMPANY, a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

REPLY BRIEF FOR APPELLANT

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SEATTLE, WASHINGTON.

FILED

JUL 16 1942

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No. 10061

IN THE
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vs.

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COMPANY, a corporation,

Appellee.

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STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

REPLY BRIEF FOR APPELLANT

PREFACE

The record clearly shows that there has been no hearing on the merits of the Government's claim either before the Special Master or the Court. The appellee does not seriously contend that there was a hearing on the merits but relies upon a legalistic application of the technical rule of *res judicata*.

We deem it necessary to file a reply brief for the purpose of clarifying the position of the appellant and distinguishing it from that of the appellee.

RES JUDICATA

Simply stated, the position of the appellant is that in the first instance the claim in the sum of \$9,387.21 was withdrawn by the Government as abated, although the record (R. 151) shows that, in fact, no part of the \$9,387.21 tax assessment then had been abated and that not until March 15, 1937, did the Commissioner of Internal Revenue adjudicate the tax claim by allowing \$6,224.65 and rejecting the abatement as to the \$3,162.56 which remained on the assessment books of the Collector as an unpaid tax assessment. The order of the District Court dated December 21, 1936, relating to the \$9,387.21 tax claim, merely confirmed the report of the Special Master that this claim had been withdrawn as abated on October 15, 1936 (R. 65-66). There was nothing before the Special Master or the District Court to pass upon relative to the merit of this claim or any part thereof. Thus there was no hearing or merit consideration of the tax or any part thereof by the Court.

The second claim was filed for the \$3,162.56 tax and the same was presented to the Special Master and no request was made to the District Court to rescind its previous order. Being a part of the \$9,387.21 previously expunged by the Court as withdrawn and abated, the Special Master recommended disallowance of same. Thereafter the District Court on November 12, 1937, approved this recommendation and expunged and disallowed the \$3,162.56 claim because "it was and is a part of the \$9,387.21 claim previously expunged as abated and withdrawn." Thus on the second claim there was no hearing on the merits nor was it in fact properly before the Special Master or the District Court for consideration since no motion or request had been filed with the District Court for leave to reinstate the \$3,162.56 claim for consideration in the bankruptcy proceedings. Regarding this, the case of *In re Universal Rubber Products Co.*, 25 F. (2d) 168, cited by appellee in its brief, pages 20, 21, 22, is interesting. In the quotation at page 22 one of the bases for refusing to allow the setting aside of a previous order at the request of the trustee, the Court stated:

"The trustee in bankruptcy does not ask to have this order rescinded. * * *."

The claim was not provable before the Special Master who was bound by the prior order of the Court regarding the \$9,387.21 claim as an abated and withdrawn tax.

The appellant concedes that a judgment which is *res judicata* in favor of the principal on a bond and which said judgment relieves the principal of his bond liability also relieves the surety from its liability on the bond. That, however, is not this case. The only action which the Government officers took related to the tax assessment and the withdrawal from the bankruptcy proceedings of the tax claim filed therein. This action precluded the Government insofar as the bankruptcy proceedings are concerned and it cannot share in the estate of the bankrupt. In the case at bar the Government's remedy is on the bond and the conclusion of the tax claim in the bankruptcy proceedings does not bar recovery because the claim was not passed upon on its merits.

The appellee's contention that the cases cited by appellant involve bonds given by a taxpayer to stay the collection of an income tax has no application to *U. S. v. Barth Company*, 279 U. S. 370. The Barth Company had given a bond guaranteeing the payment of the tax on distilled spirits, as provided by law, and

upon failure by the taxpayer to pay the tax the Government was allowed recovery under the bond.

In *U. S. v. Frost, et al*, 80 Fed. (2d) 341, the Fifth Circuit Court of Appeals held that the bond was the primary obligation and not ancillary to the obligation for the payment of taxes or penalties. In *U. S. v. Frank Bornn*, 104 Fed. (2d) 641, the Second Circuit Court of Appeals allowed recovery under the bond but reversed the judgment insofar as the tax liability of the principal was concerned and the Supreme Court of the United States in *U. S. v. Rizzo*, 297 U. S. 530, held that the Government might have several remedies in the same case and could pursue either one or all of them. In the case at bar the Government's remedy insofar as the collection of the tax from the bankrupt estate is concerned, has been concluded; but such conclusion in the bankruptcy proceedings did not pass upon the merits of the claim and does not bar recovery under the bond in this suit.

Counsel for the appellee contends that the bond is ancillary to the liability of the principal and to support this view they cite *U. S. v. Springer & Lotz, et al* 69 F. (2d) 819 (C.C.A.2). However, the Second Circuit Court of Appeals expressly overruled that de-

cision in its opinion in *Durning v. McDonnell*, 86 Fed. (2d) 91, in the following language:

“The appellants rely upon our decision in *United States v. Springer & Lotz*, 69 F. (2d) 819. We did not there hold that section 791 applied to an action on the bond; in fact, we said it did not. We held that though the action was brought in time, it failed on the merits because the penalties must themselves be ‘payable’ to be within the coverage of the bond. If that holding were still good law, the appellants should prevail, but it can no longer be sustained in view of the Supreme Court’s ruling in *United States v. Mack*, 295 U. S. 480, 55 S.Ct. 813, 79 L.Ed. 1559.”

In our opinion the controlling case on the subject is *U. S. v. American Surety Company* (C.C.A.2) 56 Fed. (2d) 734, cited and discussed in the appellant’s original brief. The appellee ignores this decision entirely although in that case a claim had been filed in the bankrupt estate of the principal and denied and recovery was allowed from the surety in a suit on the bond.

The citations by appellee in its brief relate to cases where there had been a determination on the merits and a failure on the part of the plaintiff or defendant to raise some legal defense or basis of action. In those cases the doctrine of *res judicata* properly applied and prevented a subsequent suit upon

the same cause of action. Here, as has been shown, there was no trial on the merits and, therefore, the doctrine has no application under the facts in this case.

ESTOPPEL

Appellee contends that the Government takes the position that it cannot be estopped by the acts of its agents. This interpretation, however, is erroneous. It is our contention that anyone who asserts the acts of Government agents as the basis for estoppel must show that the acts were within the scope of the authority of the agents. See *Royal Indemnity Co. v. U S.*, 313 U. S. 289, cited in appellant's original brief.

The evidence relating to the alleged agreement between counsel for the Trustee in Bankruptcy of The Coast Wineries, Inc., and Mr. Winter, attorney for the Government, has been sufficiently discussed in appellant's original brief. Appellant discussed the pleading at length in its original brief because no agreement was pleaded. Therefore, evidence concerning same is irrelevant, incompetent, and immaterial. However, should this Court consider such evidence admissible, the record clearly shows that no agreement was entered into. However, should the Court find that the conversations amount to an agreement, then, before

such agreement can be binding upon the Government, there must be a finding that Mr. Winter had authority to make it. That Mr. Winter had no such authority see *Royal Indemnity Co. v. U. S.*, *supra*.

Furthermore, the only action taken by the agents of the Government, which might constitute estoppel, was in regard to the bankruptcy proceedings and there is nothing in the record to show that the surety company at any time received notice from a Governmental agent or agency that it was relieved of liability under its bond. The evidence shows that the information obtained by the surety came through Judge Grady, counsel for the trustee, and the action taken by the bonding company relating to its indemnitors was based on this oral statement by counsel for the trustee in face of a written notice, dated June 6, 1935, from the District Supervisor, Alcohol Tax Unit, that the bond was in jeopardy (R. 121 and 122). The record reveals nothing from a Government officer withdrawing this notice.

During the period of time in controversy, the record (R. 153) clearly shows that the tax sought to be recovered in this action at all times remained as a charge against the principal on the assessment books

of the Collector of Internal Revenue. Had the appellee, who now seeks to invoke the doctrine of equitable estoppel, used due diligence, the fact that this assessment remained outstanding could readily have been determined by proper inquiry. •

Appellee cites *United States v. Alexander*, 110 U. S. 325, as authority for estoppel by action of Government officers. That case is readily distinguished from the one at bar. In that case a tax had been assessed against a distiller and the Secretary of the Treasury had approved the abatement of the tax, sent notice thereof by schedule to the Collector of Internal Revenue, and the tax was abated and removed from the assessment records of the Collector. Thereupon, notice that the tax had been abated was given the principal on the bond and the principal notified the surety that its obligation no longer existed. Later the Secretary of the Treasury reassessed the tax and sought to hold the bonding company but the Supreme Court held that it was estopped to make such claim against the bonding company by reason of the previous action in abating the tax. In the instant case there was in fact no abatement of the \$3,162.56 tax and although the Collector had erroneously advised the Special Master on October 15, 1935, that "We have abat-

ed the above tax and are withdrawing our proof of claim covering same," the Commissioner of Internal Revenue had, in fact, not abated the tax and the assessment at that time remained outstanding on his books. The Collector of Internal Revenue, in his letter of October 15, 1935, was referring to the \$9,387.21 tax assessment which included the \$3,162.56 tax made the subject of the present suit and which never was abated. As stated in the Government's original brief, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is the only official in the United States Government authorized to abate a tax.

CONCLUSION

It is respectfully submitted that the proceedings heretofore had in connection with the claim involved in this suit did not decide the merits of the claim and are, therefore, not *res judicata*, and the facts in the record do not show such action on the part of authorized Government agents which constitute an estoppel. The judgment of the Court below should be reversed and judgment entered for the plaintiff in the sum of

\$3,162.56, plus the statutory 5 percent penalty and interest, as prayed for in the complaint.

July, 1942.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

THE COAST WINERIES, INC., a corporation, and
UNITED STATES FIDELITY AND GUARANTY
COMPANY, a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

Brief of Appellee

PREFACE

The Judgment of the trial court from which this appeal was taken is based upon the following Conclusions of Law: (R. 70)

“I.

“That the proceedings in the Matter of the Bankruptcy of The Coast Wineries, Inc., in Cause Number B-1959, in the District Court of the United States for the Eastern District of Washington, Southern Division, and in particular the Order of Judge J. Stanley Webster of November 12, 1937, are *res judicata* between plaintiff and defendant, United States Fidelity

and Guaranty Company, upon the issues presented by this suit, and the action of the plaintiff to recover from the defendant, United States Fidelity and Guaranty Company, upon the tax claim asserted herein, is barred by the former adjudication, expunging and disallowing said claim.

“II.

“That the plaintiff is estopped to assert the claim sued upon herein as against the defendant, United States Fidelity and Guaranty Company.”

Appellant does not contend that the Findings of Fact do not support these Conclusions, but rather argues that the Findings of the trial court, upon which the Conclusions are based, are not supported by the evidence or the law.

Under the circumstances, we think it is important that this Court be furnished with a complete and comprehensive statement of the facts as shown by the record. The Statement of Facts as contained in appellant's brief is largely a recitation of the pleadings rather than of the facts, and is so fragmentary and incomplete that we have found it impossible to supplement it without resulting confusion. Much of the evidence is not found in the Transcript of Record but rather in the exhibits, the originals of which have been brought before this Court, and we are, therefore, taking the liberty of setting forth a complete statement of facts as supported by the evidence introduced at the trial and found by the trial court to be correct.

STATEMENT OF FACTS

On February 1, 1934, The Coast Wineries, Inc., a Washington corporation, executed and delivered a "Producer's" bond to the United States of America, in the sum of \$5,000.00, with the appellee, United States Fidelity and Guaranty Company as surety. (R. 5-6) On August 9, 1934, a similar bond was executed and delivered for \$3,000.00, with the same surety. (R. 7-8) As a condition to the writing of these bonds, the appellee required indemnitors in the persons of J. J. Dolph, W. A. Hubbert and Maude Hubbert, his wife, C. T. McKenzie and Bertha McKenzie, his wife. (R. 129)

In February of 1935, The Coast Wineries, Inc., filed a Petition in the United States District Court for the Eastern District of Washington, Southern Division, for reorganization under Section 77B of the National Bankruptcy Act. On February 27, 1935 appellant, through Alex. McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, filed a Creditor's Claim (Defendant's Exhibit A-2) for \$501.67, as "Capital Stock Tax Assessed under Sec. 215 of the National Industrial Recovery Act." On March 4, 1935, a second claim was filed by and through Alex. McK. Vierhus, Collector, for \$9,387.21, stated as being "Tax on Distilled Spirits Assessed under Sections 3244 and 3176 of Revised Statutes and under Liquor Taxing Act of 1934" (Defendant's Exhibit A-1). On June 10,

1935, a third claim was filed for \$76.20, as "Proposed Assessment of Documentary Stamp Tax under Title V, Part III, Revenue Act of 1932" (Defendant's Exhibit A-3). A portion of the tax, as claimed and covered by the claim (Defendant's Exhibit A-1 for \$9,387.21, was that assessed as follows: 605 RA 10,541 P. G. Mixed Wine (Rectified) Rate \$.30 \$3,162.56 (Plaintiff's Exhibit 1). This item of tax was that upon which this action was commenced.

On June 6, 1935, the Acting District Supervisor of the Alcohol Tax Unit of the Treasury Department, Internal Revenue Service at Seattle, Washington, sent a notice to appellee of the filing of the reorganization proceedings by The Coast Wineries, Inc., advising that the Government had filed its claim for taxes in the sum of \$9,387.21, and ended the letter stating: (Plaintiff's Exhibit 2)—

"Notice is hereby given of your liability to the extent of your bonds for any such taxes not collected from the bankrupt estate, in order that you may take any action you may deem necessary."

Acting upon this notice the appellee promptly gave notice of possible liability to its indemnitors (Plaintiff's Exhibits 6, 7).

On June 16, 1935, The Coast Wineries, Inc., was adjudicated bankrupt. (R. 114)

Following the adjudication of The Coast Wineries, Inc., as a bankrupt, the Yakima Valley Bank

and Trust Company was appointed as Trustee, and was authorized to employ Messrs. W. B. Clark and T. E. Grady, Attorneys of Yakima, Washington, as its attorneys. (R. 92, 93)

The only substantial asset of The Coast Wineries, Inc., at the time of its adjudication in bankruptcy, was a quantity of wine, the production and rectification of which formed the basis of the Government's claim for \$9,387.21 in taxes, as covered by its Creditor's Claim (Defendant's Exhibit A-1). This wine, in the hands of the Trustee in Bankruptcy, was ordered sold, and resulted in a sale for \$12,000.00 to one R. D. Rovig. (R. 116) On September 16, 1935, an Order was entered by Judge J. Stanley Webster (Plaintiff's Exhibit 5), ruling that the wine should be delivered to Mr. Rovig, free and clear of all taxes, and directing the Trustee in Bankruptcy to purchase and affix to the containers the Internal Revenue Stamps covering the gallonage and withdrawal taxes. This Order further provided:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any and all claims which the United States Government has, or may hereafter have or assert, if any, against the proceeds from the sale of said property in the hands of the Trustee, and the validity, amount and priority thereof shall hereafter be determined by the Court."

Pursuant to this Order there were purchased by the Trustee, from the \$12,000.00 sale price of the wine,

Internal Revenue Stamps to the amount of \$9,171.62.
(R. 144)

While the matter of the sale of the wine, just mentioned, was proceeding in the bankruptcy action, the Trustee in Bankruptcy filed a "Statement of Objections To Claim of United States Government" (Defendant's Exhibit A-4), in which objections were made to all three claims of the Government (Defendant's Exhibits A-1, A-2, A-3). These objections stated valid grounds for denial of tax liability on the part of the bankrupt as to all three claims. To these objections the United States of America filed a "Motion of United States of America, Claimant" (Defendant's Exhibit A-5).

On September 3, 1935, a Special Master was appointed by Judge Webster, to hear and pass upon numerous matters in connection with the bankruptcy of The Coast Wineries, Inc. On September 6, 1935, the Special Master sent out a "Notice of Hearing Before Master To The Creditors of The Coast Wineries, Inc." (Defendant's Exhibit A-6), notifying of a hearing to be held on September 18, 1935, at nine-thirty o'clock, A. M. Among other items, this Notice stated that the hearing was to determine:

"The amount, validity and priority of the claims of the United States, the State of Washington and Yakima County for taxes and assessments."

On the morning of September 18, 1935, at Yakima, Washington, and prior to the hearing before

the Special Master, a meeting occurred between Judge Thomas E. Grady, attorney for the Trustee in Bankruptcy of The Coast Wineries, Inc., and Mr. Thomas R. Winter, Special Attorney for the Bureau of Internal Revenue, at which it was agreed, as found by the trial court, that if the Trustee would withdraw his objections to the claims of appellant for \$501.67 and \$76.20, respectively (Defendant's Exhibits A-2 and A-3), the appellant would withdraw, as abated, its larger claim for \$9,387.21. (Defendant's Exhibit A-1) (R. 100-101). In accordance with this agreement between counsel, Judge Grady, as attorney for the Trustee, and Mr. Winter, as Special Attorney for the Bureau of Internal Revenue, appeared before the Special Master on September 18, 1935, and made the following statements, as appears from the record: (Plaintiff's Exhibit 9)

"MR. WINTERS: If the Court please, I represent the United States Government. I do not know whether it has been explained to your Honor or not, but Saturday Judge Webster entered an order directing the Trustee to purchase stamps and put on the wine which has not been sold, and directed the Government to gauge that wine and figure out the alcoholic action, and that is being done this afternoon.

The Government has a claim for some \$9,043.00—anyway, over nine thousand dollars. Three proofs of claim have been filed, first a claim for \$9,000, which is the rectifying tax, the stamp tax, and special tax as rectifier's license and so forth, and penalties. I am informed, at least I have an understanding, that the Trustee is going to file a claim in abatement of all of

that tax in view of Judge Webster's decision, and if that claim in abatement is allowed, the Government will request authority to withdraw the \$9,000 claim filed in this Court, and there will be no use taking testimony in that matter.

I filed a motion against Judge Grady's objections to the Government's claims, and my motion went to all three claims.

Now, will the Court continue the hearing on the Government \$9,000 claim until some later date, in order that the claim in abatement might be filed, and in all probability the claim will be withdrawn if the claim in abatement is allowed?

THE MASTER: There is just a possibility of that?

MR. WINTERS: Well, it has developed into more than a possibility, as I have advised Judge Grady, and I have assurance from the Government, and I am personally recommending the abatement of the claim in view of the situation in this matter, but, so far as the two other claims—now, we have two separate claims that have been filed, one for \$500.00, claim for capital stock tax assessed under Section 215 of the NRA, to which Judge Grady has filed what he calls a statement of objections, and I have excepted to the statement; and the other claim is a \$76.00 stamp tax assessed under Title 5 of the Act of 1932.

THE MASTER: What is the amount of the capital stock tax?

MR. WINTERS: It is five hundred dollars and some odd cents, and the stamp tax on the issuance of stock is \$76.00. These two claims involve purely a question of law, and if convenient to Judge Grady, I would be willing to submit it on a short memorandum of authorities.

MR. GRADY: That is all right with me.

THE MASTER: That is satisfactory with me.

MR. WINTERS: There is no question of fact involved.

MR. GRADY: No, the amount is all right, except perhaps if there are any penalties attached to it. I don't think there are in these two claims.

* * *

THE MASTER: The matter of the claim of the United States for rectifying tax is continued to the 28th day of September, 1935."

On September 28, 1935, pursuant to the continuance granted on September 18, 1935, the matter again came on for hearing before the Special Master. Mr. Winter again appeared, and the following occurred: (Plaintiff's Exhibit 10)

"MR. WINTERS: With respect to the claim of the United States for nine thousand and some odd dollars the Trustee has duly filed a claim in abatement with the Collector of Internal Revenue seeking the abatement of the full amount covered by this claim, and in view of the order of the Court authorizing and directing the Trustee to purchase and cancel stamps on the wine sold to R. D. Rovig, I am recommending to the Commissioner of Internal Revenue that the tax covered by the aforementioned claim be abated, in which event the claim will be withdrawn.

It is, therefore, requested that an extension be granted of ten days in order to allow administrative action to be taken by the Bureau of Internal Revenue.

THE MASTER: Motion granted.

MR. GRADY: The trustee recommends to the

Master that the \$500.00 capital stock stamp tax claim, and the other \$76.00 stock tax claim be allowed to take the priority under 64-A."

On October 15, 1935, the Collector of Internal Revenue, at Tacoma, Washington, sent a letter to the Clerk of the District Court for the Eastern District of Washington (Defendant's Exhibit A-7), stating in plain and unequivocal language the following:

"Reference is made to our claim No. 2 filed under date of June 7, 1935 covering tax on distilled spirits due from the above named corporation in the amount of \$9,387.21.

You are advised that upon the recommendation of the District Supervisor of the Alcohol Tax Unit, we have abated the above tax and are withdrawing our proof of claim covering the same. Our claims No. 1 and No. 3 covering capital stock taxes are still in effect."

Pursuant to this letter, the Special Master filed his Report and Recommendations on December 6, 1935, and with reference to the claim of the Government for \$9,387.21 (Defendant's Exhibit A-1), reported as follows: (Defendant's Exhibit A-8)

"Claim No. Sixty-nine (69) filed by the United States Collector of Internal Revenue in the amount of Nine Thousand Three Hundred eighty-seven and 21/100 (\$9,387.21) has been withdrawn (Trustee's Exhibit J). This claim represented a tax on distilled spirits assessed under Sections 3244 and 3176 of the Revised Statutes and under the Liquor Taxing Act of 1934. The tax was abated under date of October 15, 1935."

Slightly more than a year later, on December 21, 1936, Judge Webster filed a "Memorandum Opinion" (Defendant's Exhibit A-9), approving the report of the Special Master.

While the foregoing proceedings were being carried on in the Bankruptcy Court, word came to the appellee that the claim of the United States for taxes, as covered by the Creditor's Claim (Defendant's Exhibit A-1), and as to which defendant had been given notice of liability by the letter of June 6, 1935 (Plaintiff's Exhibit 2), had been abated and withdrawn. (R. 123, 124) In reliance upon this information, defendant abandoned its intention to file a Creditor's Claim against the Estate of its indemnitor, J. J. Dolph, which was then in probate in the Superior Court of the State of Washington for Spokane County, and permitted the time for filing Creditors' Claims against this estate to expire (Defendant's Exhibit A-13). (R. 125, 126) The certified copy of the Inventory and Appraisement of this Estate, filed herein as "Defendant's Exhibit A-12", disclosed ample assets from which such a Creditor's Claim could have been paid, if asserted. Believing that the claim against it upon its bonds had been closed, the defendant closed its claim files upon the claim. (R. 126)

Approximately one and one-half years after the Bankruptcy Court had been definitely advised, on

October 15, 1935, that the Government's claim for taxes, in the sum of \$9,387.21, and as covered by its Creditor's Claim (Defendant's Exhibit A-1), had been abated and withdrawn, the Government, on April 15, 1937, filed *In the Matter of Coast Wineries, Inc. Bankrupt*, a new Creditor's Claim, (Defendant's Exhibit A-10), for \$3,162.56, being a portion of the tax which the Court had previously been advised had been abated (Plaintiff's Exhibit 1). Upon oral objection of the Trustee to the allowance of the claim, the matter came on for hearing before Judge J. Stanley Webster on October 5, 1937. As a result of this hearing an Order was entered November 12, 1937 (Defendant's Exhibit A-11), which provided:

"ORDERED, ADJUDGED AND DECREED that the said claim of the United States in the sum of \$3,162.56 filed on April 13, 1937, be, and the same is hereby expunged and disallowed." No appeal or petition for review of this Order was ever taken.

Again an interval of approximately one and one-half years elapsed, and on March 7, 1939, the United States of America made demand upon appellee for the \$3,162.56 in taxes for which Judge Webster had denied recovery, and upon refusal of appellee to pay the amount demanded this action was instituted.

ARGUMENT

As pointed out in the preface to this brief, the Judgment in favor of appellee is based upon two grounds,— *res judicata* and *estoppel*. Either of

these grounds is self-sufficient, and although we believe both are amply supported by the record, the Judgment must be affirmed if either is found to be meritorious.

Appellant has seen fit in its brief to devote itself primarily to an attack upon the finding of estoppel, apparently in the hope of diverting attention from the conclusive effect of the finding of res judicata. We shall hereafter demonstrate the unsoundness of the attack upon the defense of estoppel, but wish first to present argument concerning the finding of res judicata.

Res Judicata

In the Matter of the Bankruptcy of The Coast Wineries, Inc., there were two separate and conclusive adjudications concerning the tax claim in issue, either of which were and are sufficient to constitute ample grounds for the defense of res judicata and to support the Judgment of the trial court. It is an admitted fact that the taxes, recovery of which are sought in this action, were included in the original claim filed by appellant in the bankruptcy proceeding. (Defendant's Exhibit A-1.) With respect to this claim, the Special Master reported on December 6, 1935 (Defendant's Exhibit A-8):

"Claim No. Sixty-nine (69) filed by the United States Collector of Internal Revenue in the amount of Nine Thousand Three Hundred eighty-seven and 21/100 (\$9,387.21) has been

withdrawn (Trustee's Exhibit J.) This claim represented a tax on distilled spirits assessed under Sections 3244 and 3176 of the Revised Statutes and under the Liquor Taxing Act of 1934. The tax was abated under date of October 15, 1935."

This report and recommendation was approved by Judge J. Stanley Webster on December 21, 1936. (Defendant's Exhibit A-9.)

Subsequently, on April 15, 1937, appellant filed a new Creditor's Claim in the bankruptcy proceeding for the tax sought to be recovered by this action, to which claim oral objections were made by the Trustee. The claim and objections were heard before Judge J. Stanley Webster on October 5, 1937, and resulted in the entry on November 12, 1937, of an Order which provided: (Defendant's Exhibit A-11)

"ORDERED, ADJUDGED AND DECREED that the said claim of the United States in the sum of \$3,162.56 filed on April 13, 1937, be, and the same is hereby expunged and disallowed."

Neither the Order of December 21, 1936, nor that of November 12, 1937, were appealed from by appellant in this action.

Appellant has sought to escape the force of the latter Order of November 12, 1937, by arguing, first, that it had withdrawn its claim from consideration by the Court, and hence there was nothing before the Court upon which the Order could operate; and, second, that its claim was non-provable in character

and that this was the basis of the Judgment of the Court. (Appellant's brief, 23, 24.) THESE CONTENTIONS HAVE NO SUPPORT IN FACT. The Order of Judge Webster clearly showed that the claim had not been withdrawn, but was before the Court for adjudication upon its merits, and it was by the Order itself that the claim was "expunged and disallowed." No reason is stated in appellant's brief why its tax claim was a "non-provable" one under the Bankruptcy Act, and we submit that no sound reason can be advanced in support of this position.

The relationship of The Coast Wineries, Inc., and of appellee, United States Fidelity and Guaranty Company, to the United States of America was that of principal and surety, respectively. This relationship is definitely established by a study of the statutes under which the bonds were given and the obligations of the bonds themselves.

The bonds were written pursuant to the provisions of what is now 26 U. S. C. A., Section 3040 (formerly 26 U. S. C. A., Section 1306), reading as follows:

"Requirements on producers.

"(a) *Notice, bonds, and stamps.* Every person producing after February 24, 1919, or having in his possession or under his control on February 24, 1919, any wines subject to the tax imposed in paragraphs (1) and (2) of section 3030(a) shall file such notice, describing the

premises on which such wines are produced or stored; shall execute a bond in such form; shall make such inventories under oath; and shall, prior to sale or removal for consumption, affix to each cask, barrel, bottle, or other immediate container, and to each case or other shipping container, of such wine, such marks, labels, or stamps as the Commissioner, with the approval of the Secretary, may from time to time prescribe as to each; and the premises described in such notice shall, for the purpose of this chapter, be regarded as bonded premises."

The conditions of the bonds which were required of The Coast Wineries, Inc., pursuant to the provisions of the statute quoted, and which bonds form the basis of appellant's claim against the appellee were as follows:

"WHEREAS, the above bounden principal is engaged or intends to engage in business of making and selling domestic wines on premises located at 213 West P Street, in the Twelfth Collection District of Washington.

"NOW, THEREFORE, the condition of this obligation is such that if the said principal shall fully and faithfully comply with all requirements of the laws of the United States and regulations issued in pursuance thereof respecting the production, storage, sale or removal and the accounting of all wines produced or received by him, or which now remain on said premises; and if the said principal shall well and truly pay all taxes due on said wines at the time and in the manner required by said laws and regulations, then this obligation to be void; otherwise to remain in full force and effect."

A study of these conditions, coupled with reference to the statute under which the bonds were required,

clearly discloses that the obligation of appellee was ancillary to the liability of the principal, The Coast Wineries, Inc.

It is a fundamental rule of law of principal and surety that the surety is relieved by any defense which would be available to the principal.

50 Corpus Juris 71, Section 126.

50 Corpus Juris 74, Section 127.

21 R. C. L. 974, Section 27.

As a corollary to the rule just stated, it is an established rule of law that a surety can set up as a defense a judgment rendered in favor of its principal, and that a judgment which is *res judicata*, and a bar so as to release a principal from obligation, also releases his surety.

50 Corpus Juris 93, Section 150.

21 R. C. L. 1066, Section 107.

Kramer v. Morgan, 85 F. (2d) 96 (C.C.A. 2).

Hurd v. United States Fidelity & Guaranty Co.,
227 P. (Kan.) 337.

The United States of America is bound by estoppel of a Judgment the same as a private individual.

34 Corpus Juris 1039, Section 1477.

Fendall's Case, 14 Ct. Cl. 247.

The Atlantic Dredging Company v. The United States, 35 Ct. Cl. 463.

Edmunds v. United States, 24 F. Supp. 742.

Wortham v. Walker, 128 S. W. (2d) 1138.

United States v. O'Grady, 22 Wall. 641.

It is a rule of universal acceptance that a Judg-

ment is *res judicata* not only as to matters which were actually determined by the Court, but also as to the rights and issues which might have been presented.

30 *American Jurisprudence* 923, Section 179.

The Norco, 1 F. Supp. 932 (D.C., W.D., Washington, N. D.)

Golden v. McGill, 3 Wn. (2d) 708, at 720; 102 P. (2d) 219.

Baltimore Steamship Company v. Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069.

The burden is upon the party against whom a judgment is pleaded to show and prove that it was not upon the merits.

Sweeney v. Waterhouse & Co., 43 Wash. 613, at Page 616, 86 P. 946.

Parol evidence is not admissible to contradict or explain the judgment.

34 *Corpus Juris* 1070, Section 1515.

McGuire v. Bryant Lumber, etc. Mill Co., 53 Wash. 425, 102 P. 237.

The bankruptcy court is a court of general jurisdiction, and its judgments, orders and decrees are entitled to the same weight as similar judgments, orders and decrees from other courts of general jurisdiction.

Remington on Bankruptcy, 4th Ed., Volume 5, Page 459, Section 2312.75.

The allowance or disallowance of a claim in a bankruptcy proceeding is in the nature of a final

judgment and constitutes a basis for the plea of *res judicata*.

8 *C. J. S.*, Page 1314, Section 444.

Woods v. Rapoport, 128 Wash. 140, 222 P. 220.

In the determination of the legality and priority of Federal tax claims, the bankruptcy act is paramount over other Federal and State statutes, and hence the orders of the bankruptcy court upon tax claims are final and conclusive upon all parties.

In re Anderson, 279 Fed. 525.

In this case an income tax was due from the bankrupt to the United States. The United States filed no proof of claim for the tax, and during the administration of the bankruptcy proceedings the trustee served a notice of motion and petition on the collector of internal revenue, returnable before the referee in bankruptcy, in which petition the trustee prayed for "an order barring and foreclosing the United States from participating in the estate herein, or in the alternative that the United States be directed to file its claim or claims with the referee herein on or before a day certain, in order that the trustee may object thereto and hearings had on said claim in accordance with law."

The United States appeared in answer to this petition and moved to dismiss upon the ground that the court was without jurisdiction. The holding of the case is expressed in the syllabus, as follows:

“Bankruptcy Act, Sec. 64a (Comp. St., Sec. 9648a), provides that ‘the court shall order the trustee to pay all taxes legally due or owing by the bankrupt to the United States, state, county, district, or municipality in advance of payment of dividends *** and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.’ *Held* that, under such provision, the court has jurisdiction to determine the amount and validity of a tax claimed by the United States, and that, inasmuch as a trustee can pay the tax only on an order of the court, he may properly, by notice served on the collector for the district, require the United States to file its claim within a time fixed or otherwise be barred, to the end that settlement of the estate may not be unreasonably delayed.”

In re Universal Rubber Products Co., 25 F. (2d) 168.

During the course of the bankruptcy proceeding of the Universal Rubber Products Company the trustee, without authority of the referee, voluntarily paid to the United States \$26,590.83, as claimed excise taxes and interest. Subsequent to such payment the trustee filed a petition with the referee in bankruptcy, asking that the tax claim of the United States in excess of the amount already paid by the trustee be disallowed, and that the United States be forever disbarred from asserting any further claim on account of the alleged taxes. Upon this claim an order to show cause was issued and served upon the collector of internal revenue, and upon the failure of the collector to appear, an order

was entered, disallowing the tax claim in excess of the amount already paid, namely, \$26,590.83. The collector of internal revenue took no exceptions to this order and made no petition to review the same. Subsequently the trustee in bankruptcy filed a claim with the Commissioner of Internal Revenue for a refund of a portion of the taxes paid, and a show cause order was again issued to the collector of internal revenue, to which the collector filed a motion to dismiss, upon the ground that the court was without jurisdiction. Upon a hearing on the petition and motion to dismiss, and after the referee had overruled the motion to dismiss, the government requested permission to file an amended claim against the estate for the excise taxes which had been compromised with the trustee, prior to the entry of the order of December 1, 1925. In holding that the prior order was binding upon both the trustee and the United States, the Court stated:

“We are of the opinion that the facts of this case do not justify the granting to the trustee of the relief he now seeks. We believe that the order of December 1, 1925, was a final adjudication of this tax claim, and that it is conclusive, both against the trustee in bankruptcy, who asked that it be entered, and against the collector against whom it was entered, without appeal. While it is true, as provided in section 57K of the Bankruptcy Act, as amended (11 USCA, Sec. 93), that claims which have been allowed may be reconsidered for cause, and reallocated or rejected in whole or in part, according to the equities of the case, we do not find any case here presented which justifies the

opening or setting aside of the order of December 1, 1925. The trustee in bankruptcy does not ask to have this order rescinded, nor does he show that he was in any way misled into seeking the same. He ought not, therefore, to be permitted again, nearly a year after the making of that order, to go into the computation of these taxes. There ought to be a time in the course of legal proceedings when the orders of court become final, and when the litigation in a particular matter is ended. It seems to the court that that particular time arrived in this case, when the order of December 1, 1925, was entered. While it may be true that this bankrupt estate ought not to pay excise tax on business transacted between the date of the filing of the petition and the time of adjudication, we believe it is too late now to raise that question; and we pass no opinion upon it.

"We further hold that the petition of the government, presented to the referee in June, 1927, for leave to file amended claims in this case, was presented at too late a date, because of the fact that the claim of the government was finally adjudicated by the order of December 1, 1925. On the whole case, we are of the opinion that no affirmative relief should be granted either to the trustee in bankruptcy or to the government."

In *In re Anderson*, 275 Fed. 397, it was held that the court in bankruptcy had authority to determine the tax claims of the United States, even though the United States did not appear in the proceeding or file a proof of claim. The decision by Judge Learned Hand is as follows:

"Under the present act it has, however, been several times held that the bankruptcy court had jurisdiction directly to reassess or liquidate a tax, regardless of its conclusiveness under

the domestic law or of the procedure established to review it. *New Jersey v. Anderson*, 203 U. S. 483, 493, 494, 27 Sup., Ct. 137, 51 L. Ed. 284; *In re W. P. Williams Oil Corp. (D. C.)*, 265 Fed. 401; *In re United Five and Ten Cent Stores (D. C.)*, 242 Fed. 1005. In all of these cases the point came up upon claim filed by the taxing power, and therefore this question of jurisdiction did not arise; still the power of the bankruptcy court over the subject-matter is settled.

"The case turns upon the implications necessarily to be drawn from section 64a of the present act (Comp. St., Sec. 9648). It provides:

" 'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.'

"The section shows that taxes are treated as quite different from dividends, as payments to be made before the distribution proper of the estate takes place. *Lewis v. United States*, *supra*, may still be law, and certainly no claim for taxes need be filed, but that has nothing to do with the question at bar. The section contemplates that the taxes shall be liquidated and paid at once, a purpose which cannot be accomplished if the estate must wait some action by the taxing power. If the court has no power conclusively to decide the issues, it is obliged to hold up the administration until such time as the United States or a state may choose to proceed. It appears to me to be a necessary implication of the statute that some action may be taken in invitum."

In re Standard Composition Co., 23 F. Supp., 391.

“*** In the determination of the legality and priority of federal tax claims, the Bankruptcy Act is paramount over other federal and state statutes. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706; *Missouri v. Ross*, 299 U. S. 72, 57 S. Ct. 60, 81 L. Ed. 46. ***”

Bearing in mind the principles of law as announced in the foregoing cited cases, the basis for the Judgment of the trial court upon the defense of *res judicata* may be thus summarized.

The relationship between The Coast Wineries, Inc., and appellee was that of principal and surety. Any defense to the appellant's claim which would have been available to The Coast Wineries, Inc., as principal, was also available to appellee as surety. The Judgments of the Bankruptcy Court of December 21, 1936 and of November 12, 1937, both upon the record and *prima facie*, were upon the merits of appellant's claim and cannot be impeached or contradicted by oral evidence. The disallowance of such claim in the bankruptcy proceeding was a final judgment and, since in the determination of the legality and priority of Federal tax claims the Bankruptcy Act is paramount over other Federal and State statutes, the orders of the Bankruptcy Court were final and conclusive and constituted a proper basis for a plea or *res judicata*. The United States of America is bound by the estoppel of judgment the same as a private individual, and hence was and is bound in this case.

In a final attempt to escape the conclusiveness of the defense of *res judicata*, appellant has attempted to contend that this was and is an action upon the bonds of which appellee was surety, rather than for taxes due. In support of this position appellant relies upon the following cases:

Bowers, etc. v. American Surety Company, 30 F. (2d) 244.

U. S. v. Barth Co., 279 U. S. 370, 49 S. Ct. 366, 73 L. Ed. 743.

Gulf States Steel Co. v. United States, 287 U. S. 32, 53 S. Ct. 69, 77 L. Ed. 150.

Gray Motor Co. v. U. S., 16 F. (2d) 367.

U. S. v. Wyoming Central Association, 70 F. (2d) 869.

Each of these cases is clearly distinguishable from the case at bar.

In each of the cases referred to and relied upon by appellant the bond was one given by a taxpayer to *stay* the collection of an *income tax* already assessed, pending decision upon a claim for abatement. It is the uniform holding of the Federal Courts that this type of bond, being supported by a consideration independent of the tax itself, namely, the stay of enforcement of collection, is a primary and independent obligation on the part of the bonding company, and as such is not subject to defenses which might be asserted by the taxpayer with respect to the tax. The basis for the holdings in these cases is pointed out in *United States v. Wyoming*

Central Ass'n., 70 F. (2d) 869, at Page 872, as follows:

"The bond, which was based on a valid consideration, gave the United States a cause of action separate and distinct from an action to collect taxes. *United States v. John Barth Co.*, 279 U. S. 371, 49 S. Ct., 366, 73 L. Ed. 743; *Bryant-Link Co. v. Hopkins* (C. C. A. 5), 47 F. (2d) 1068; *United States v. E. Hogshire, Son & Co.* (D. C. Va.), 37 F. (2d) 720. In effect, the bond was a contract liability substituted for the tax liability, and was valid and enforceable."

The distinction between the cases relied upon by the appellant and the case at bar was pointed out in *United States v. Springer & Lotz, et al*, 69 F. (2d) 819 (C. C. A. 2), in the following language:

"*** There is also a class of cases in which a taxpayer or other obligor to the government secures an extension of execution in consideration of a bond to secure the liability. When he has later asserted as a defence that the statute has tolled action upon the principal liability and with it action on the bond, he has always been unsuccessful. *United States v. John Barth Co.*, 279 U. S. 370, 49 S. Ct. 366, 73 L. Ed. 743; *Gray Motor Co. v. U. S.*, 16 F. (2d), 367 (C. C. A. 5); *Roberts Sash & Door Co. v. U. S.*, 38 F. (2d) 716 (Ct. Cl.); *Hughson v. U. S.*, 59 F. (2d) 17 (C. C. A. 9). In such cases the condition cannot mean that the obligor shall be released if action on the principal debt is tolled, for that would defeat the obvious purpose of the transaction. The obligor wishes to hold off execution and gives the bond for that reason; the obligee will normally understand that his delay of execution will not destroy the liability; that on the contrary it is not intended to defeat it but

merely to extend it. Any other construction would deny the presupposition of the parties that the bond is to preserve the liability. Nothing of the sort is true in the case at bar; no penalty, no tax had arisen; perhaps none ever would; but if it did, the bond was to make certain that it should be discharged. It was only ancillary to the debt, and could not have been intended to survive it. ***"

Appellant has failed to call to the attention of the Court any case where it has been held that a bond, such as the one here at issue, has been held to be an independent and primary obligation of the bonding company.

The Judgment of the trial court, holding the Order of Judge J. Stanley Webster, *In the Matter of the Bankruptcy of The Coast Wineries, Inc.*, to be res judicata as to the appellant's claim against appellee, is amply supported by the record and the Judgment must be affirmed, upon this ground.

Estoppel

There are two factual bases for the conclusion of the trial court that the appellant was and is estopped to prosecute this claim against the appellee, United States Fidelity and Guaranty Company.

The first of these is the agreement between counsel for the Trustee in Bankruptcy of The Coast Wineries, Inc., and counsel for the Internal Revenue Bureau, that in consideration of the withdrawal by the Trustee of his objections to the creditors' claims of appellant for \$501.67 and \$76.20, respectively

(Defendant's Exhibit A-2 and A-3), the appellant would withdraw its creditor's claim for \$9,387.21 (Defendant's Exhibit A-1), which included the taxes, the recovery of which are sought in this action. The trial court specifically found that this agreement was made in fact, and the record is clear and positive that this agreement was reported to the Special Master in the bankruptcy proceeding and acted upon by both counsel and the court. (R. 64, 65) These Findings of Fact are conclusive upon appeal in the absence of obvious errors of law or serious mistakes of fact.

Gila Water Company v. International Finance Corporation (C. C. A.), 13 F. (2d) 1, 2.

Easton v. Brant (C. C. A.), 19 F. (2d) 857, 859.

Exchange Nat. Bank of Spokane v. Meikle (C. C. A.), 61 F. (2d) 176.

McCullogh v. Penn Mutual Life Ins. Co. (C. C. A.), 62 F. (2d) 831.

United States v. McGowan (C. C. A.), 62 F. (2d) 955.

Collins v. Finley (C. C. A.), 65 F. (2d) 625.

The second factual basis for estoppel is to be found in the loss by the appellee of its rights to recover from its indemnitors, and in particular J. J. Dolph, through the acts of appellant.

It appears from the record that as soon as appellee was given notice, dated June 6, 1935 (Plaintiff's Exhibit 2), of possible liability upon its bond, it notified the administratrix of the estate of J. J.

Dolph, deceased, of its intent to hold the indemnitors under the bond for any liability which might be assessed against appellee. (Plaintiff's Exhibits 6, 7; R. 125) When it later came to the attention of appellee that the claim of the appellant, *In the Matter of Bankruptcy of The Coast Wineries, Inc.*, for the taxes in question had been withdrawn and abated, the appellee, thinking it had been relieved from any claim under its bond, took no further steps to assert a claim against the estate of J. J. Dolph, deceased, and permitted the time for filing creditors' claims to expire. (R. 126) The record establishes that the estate of J. J. Dolph, deceased, was substantial and would have been sufficient to pay any claim asserted by appellee under its indemnity agreement. (Defendant's Exhibit A-12).

There can be no doubt that either of the sets of facts as stated would be sufficient in a suit between individual litigants to establish estoppel as a matter of law; and, in fact, we do not understand appellant to contend that this is not so. Rather, appellant rests its contention upon two grounds: first, that an attorney for the Government cannot bind the Government by stipulation or agreement in a court proceeding in which he is authorized to appear, even though such agreement may be acted upon by the counsel and the court; and, second, that the United States of America can never be estopped by the acts of its agents.

No authority has been cited in support of the first contention. As bearing upon the question, we call the attention of the Court to the United States Supreme Court case of *United States v. Rizzo*, 297 U. S. 530, 80 L. Ed., 844. In this case the Court avoided a decision upon the precise question under consideration by finding that no agreement had, in fact, been made by the United States attorney, and stated:

“* * * Since counsel did not agree to waive the tax lien on the proceeds, and since the Court of Appeals made no finding of such a waiver, we need not consider whether a United States Attorney had authority to waive the Government's right. ***”

It is respectfully submitted that unless the courts and counsel can rely and act upon agreements and stipulations made by a United States attorney, as a part of the conduct of a case which the attorney is employed to prosecute, vast confusion will result and the orderly administration of justice in the courts will be seriously impaired. *If the rule, as contended for by the appellant, should be upheld, it will be impossible for any trial court to accept a statement or stipulation by a Government attorney during the progress of the trial, without first requiring that such Government attorney obtain from some person or bureau claimed to have authority by statute a written consent to the statement or stipulation.*

In support of its second position, appellant has

cited a number of cases, on pages 17, 18 and 19 of its brief. Reference to the cases there cited will disclose the Court stating:

“*** ordinarily the United States cannot be estopped by the acts of its subordinate officials and agents.”

McDonald v. U. S. 89 F. (2d) 128.

“Usually, the United States cannot be estopped by any acts of her agents.”

U. S. v. Norton, 77 F. (2d) 731.

“There is no question of estoppel as a consequence of the mistake involved.”

Dubuque & S. C. R. Co. v. Des Moines Val. R. Co., 109 U. S. 329, 27 L. Ed. 952.

In the light of these statements it cannot be categorically stated that the United States cannot be estopped by the acts of its agents. That this is true is demonstrated by the following case, which is directly in point upon the facts of the instant case on the principle of estoppel:

United States v. Alexander, 110 U. S. 325.

The action was one to recover against the sureties on a distillery warehouse bond for taxes claimed to have been assessed against the principal. It appears from the opinion that the Commissioner of Internal Revenue entered an order abating the taxes in question, and that notice of such abatement was given to the sureties. Subsequently the order of the Commissioner, abating the taxes, was withdrawn, and the taxes reestablished. Following

receipt of notice of the original abatement of the taxes, and before notice of the withdrawal of the abatement, the sureties had released indemnitors. Under such circumstances, it was held that the United States was estopped to assert a claim against the sureties upon the bond for the taxes. The following, from the opinion of the Court, by Mr. Justice Woods, is applicable:

“If we yield to the contention of the appellants in this case, we must hold that the Secretary of the Treasury may, at his discretion and at any time, subject the obligors, both principals and sureties, upon a bond which had once been discharged, to a new liability, by an order of which they had no notice. *It may be fairly presumed that sureties take indemnity from their principals. We cannot hold that after they have had notice of the discharge of the bond on which they were sureties, and when their relations to their principals may have entirely changed, and their indemnity been surrendered, it is within the power of the Secretary of the Treasury, without notice to them, to revive the bond and reimpose its obligation upon them.* We do not think that the statute which authorizes the abatement of taxes and the cancellation of the bond gives authority to the Secretary of the Treasury to retry the question of abatement so as to keep alive the liability of the obligors upon the bond after the taxes have once been abated and they have received notice thereof.” (Italics ours.)

The application of the rule was recognized, but refused, upon the facts in *Moses v. United States*, 166 U. S. 571. The following language from the case shows the recognition of the principle:

“*** And there is no evidence that the sureties suffered any damage by reason of any action or lack of action on the part of the government.

“As to the certificates of non-indebtedness, there is no legal presumption that the sureties had any knowledge that these certificates had ever been given to Howgate either at the time of or soon after his resignation, or at all. The case of *United States v. Alexander*, 110 U. S. 325, does not hold that there is any such presumption. In that case the Secretary of the Treasury having abated taxes against the defendant, under an act of Congress, the Commissioner of Internal Revenue gave notice of the fact to the principals in the bond, who then gave the same notice to their sureties, and the case was not decided on the ground of any presumption of knowledge on the part of the sureties as to the abatement.

“We have looked at the cases cited by the counsel for the defendants upon this branch of the case. They all show either the giving of notice to the sureties of payment of the debt for which they were originally liable, or an admission of payment of the debt by the holder thereof, or a declaration of the holder of the security that he would exonerate the surety, or else a reliance by the sureties upon some conduct of the holder of the security towards them, and a necessary injury to them if the holder should be permitted to subsequently assume a different attitude. The cases referred to are placed in the margin.

“The case here is entirely barren of evidence that the sureties had knowledge of any fact

going towards their exoneration, or that they acted or failed to act in any particular with reference to their principal by reason of the conduct of the government officials or the existence of the certificates mentioned. We are of opinion also that no such exonerating fact existed."

It clearly appears from this last quoted opinion that had it appeared, as it does in the instant case, that the surety had acquired definite knowledge of the abatement of the tax, and in reliance thereon had released its indemnitors, the doctrine of estoppel, as established in the case of *United States v. Alexander*, 110 U. S. 325, heretofore quoted, would have been held applicable.

Upon both the facts and the law the decision of the trial court, holding the appellant estopped to assert its claim against appellee, United States Fidelity and Guaranty Company, must be affirmed.

CONCLUSION

As to the Finding and Conclusion by the trial court upon the defense of res judicata, we cannot better summarize the position of appellee than to quote from the memorandum opinion of Judge Jeremiah Neterer, which stated: (R. 55-56).

" 'The order * * * was a final order binding as between the parties. There can be no question but that the jurisdiction of the bankruptcy court was properly exercised * * *.' So said the

Supreme court in *Sampsell v. Imperial Paper & Col. Corporation* in opinion filed April 28, 1941.* (not reported). Commenting on a like order the Court further said 'There was no appeal from the order entered * * *. It therefore could not be collaterally attacked * * *.' A like status as here, the Supreme Court added 'The power of the bankruptcy court * * * is complete.'

"This expression from the Supreme Court fixed the status of Judge Webster's order.

"The conclusion is inevitable that the issue is *res adjudicata*. The fact and right was directly in issue, and specifically determined by Judge Webster, who had jurisdiction of the subject matter, and of the parties, and the issue may not again be disputed in this case by the parties or their privies. The question of *res adjudicata* was exhaustively discussed by the writer sitting in the Circuit Court of Appeals with Judge Gilbert and Judge Rudkin in *U. S. v. Sakharam Ganesh Pandit*, 15 Fed. (2d) 285. The opinion was unanimous. *Certiorari* was denied by the Supreme Court, 273 U. S. 759. What is said in the 'Pandit' case is applicable and decisive here."

Upon the Finding and Conclusion of estoppel, the trial court merely remarked in its memorandum opinion: (R. 58)

"Without discussing the question of estoppel, I will say, that I think, upon the record the plaintiff likewise is estopped from asserting its claim in suit."

**Sampsell v. Imperial Paper & Col. Corporation*, 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293.

This conclusion was and is amply supported by the record and by legal precedent as heretofore set forth, and constitutes an additional ground why the judgment of the lower court must be affirmed.

Respectfully submitted,

ALLEN, HILEN, FROUDE & DeGARMO,
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*Attorneys for Appellee,
United States Fidelity and Guaranty Company.*

No. 10065

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN KONG YEUNG,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Territory of Hawaii.

FILED

MAY 11 1942

PAUL P. O'BRIEN,
CLERK

No. 10065

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD

For the Plaintiff, Territory of Hawaii

CHARLES E. CASSIDY, Esq.,
Prosecutor, City and County of Honolulu,
City Hall,
Honolulu, T. H.

For the Defendant, John Kong Yeung

Mr. PHILIP SILVER
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101-103 Rice Building,
227 S. King Street,
Honolulu, T. H. [1*]

*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

CLERK'S MINUTES [5]

At Term: Tuesday, October 7, 1941 2:00 P. M.

Present: Hon. John Albert Matthewman, Fifth
Judge presiding

M. N. Olds, Clerk

C. Cowart, Reporter

Counsel: C. Cassidy, Esq., Public Prosecutor

J. V. Esposito, Esq., for the Defendant

CONTINUANCE

Mr. Esposito requested a continuance of the matter of plea until Friday, October 10, 1941, arguing that he desired to make further study on the question of having the above entitled cause removed to the Federal District Court of Hawaii for trial, and that he did not wish to enter a plea at this time for fear that he thereby might jeopardize the defendant's right of having the above entitled cause removed to the Federal District Court of Hawaii.

2:07 p. m. Mr. Cassidy argued against the granting of the continuance reminding the Court of the witnesses who were being delayed in Honolulu awaiting the trial of the above entitled cause. Mr. Cassidy further asked that said cause be set for trial on Tuesday, October 14, 1941 at 9:00 a. m.

2:12 p. m. Mr. Esposito objected to Mr. Cassidy's request.

2:13 p. m. the Court ordered the matter of plea set for Friday, October 10, 1941 at 2:00 p. m., and upon a plea of not guilty being entered on that day, the Court further ordered that setting of the above entitled cause for trial would also take place at the same time.

By Order of the Court:

(Sgd.) M. N. OLDS

Clerk

At Term: Friday, October 10, 1941 2:30 P. M.

Present: Hon. John Albert Matthewman, Fifth

Judge presiding

R. P. Whitmarsh, Clerk

G. Clark, Reporter

Counsel: C. Cassidy, Esq., Public Prosecutor

J. V. Esposito, Esq., for the Defendant

TRANSFER OF CAUSE TO FEDERAL COURT

Mr. Esposito addressed the Court, stating that a document had been filed in this Court for the transfer of the above entitled cause to the Federal District Court of Hawaii.

Mr. Cassidy stated that this Court had lost jurisdiction of the above entitled cause.

Upon the showing made by counsel, the Court ruled that it had no jurisdiction over the cause, and ordered the case taken off the calendar.

By Order of the Court:

(Sgd.) R. P. WHITMARSH

Clerk [6]

C. N. 16525

Murder in the Second Degree

TERRITORY OF HAWAII

vs.

JOHN KONG YEUNG,

Defendant.

At Term: Thursday, October 2, 1941 3:05 P. M.

Present: Hon. John Albert Matthewman, Fifth

Judge presiding

M. N. Olds, Clerk

R. N. Linn, Reporter

Counsel: C. Cassidy, Esq., Public Prosecutor

TRUE BILL

The Grand Jury having returned a true bill in the above entitled cause, the Court ordered that arraignment be set for 2:00 o'clock p. m., Friday, October 3, 1941.

By Order of the Court:

(Sgd.) M. N. OLDS

Clerk

At Term: Friday, October 3, 1941 2:12 P. M.

Present: Hon. John Albert Matthewman, Fifth
Judge presiding
M. N. Olds, Clerk
G. Clark, Reporter

Counsel: C. Cassidy, Esq., Public Prosecutor

ARRAIGNMENT

J. V. Esposito, Esq., entered his name as counsel for the above named defendant, and asked that the matter of plea be continued for one week.

Mr. Cassidy furnished counsel for the defendant with a copy of the indictment. Mr. Esposito waived the reading of the indictment.

Mr. Cassidy objected to the continuance of the matter of plea for one week, stating that certain material witnesses who were in the employ of the Federal Government were being delayed in Honolulu for trial of the above entitled cause, and that said delay was causing these witnesses undue hardship.

Mr. Esposito renewed his request, and Mr. Cassidy then asked that the matter of plea be continued until Tuesday, October 7, 1941 at 2:00 P. M.

The Court thereupon ordered the matter of plea continued until Tuesday, October 7, 1941 at 2:00 p. m.

By Order of the Court:

(Sgd.) M. N. OLDS

Clerk [7]

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

Cr. No. 16525

January Term 1941

THE TERRITORY OF HAWAII

vs.

JOHN KONG YEUNG,

Defendant.

INDICTMENT FOR MURDER
IN THE SECOND DEGREE

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that John Kong Yeung, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 22nd day of September, 1941, with force and arms, unlawfully, feloniously, wilfully, and of his malice aforethought, and without authority and without justification and without extenuation by law, in and upon one Martin R. Connelly, a human being then and there being, a felonious assault did make; and that he, the said John Kong Yeung, with a certain pistol loaded with gunpowder and bullets, which he, the said John Kong Yeung, in his hand then and there had and held, at and against the body of him, the said Martin R. Connelly, unlawfully, feloniously, wilfully, and of his malice aforethought, and without authority and without justification and without extenua-

tion by law, did shoot off and discharge; and the said John Kong Yeung, with the pistol aforesaid, by the shooting and discharging aforesaid, did then and there give to him, the said Martin R. Connelly, a certain mortal wound of which said mortal wound the said Martin R. Connelly did, on the said 22nd day of September, 1941, die; and [11] that so in manner and form aforesaid, and at the time and place aforesaid, the said John Kong Yeung unlawfully, feloniously, wilfully, and of his malice aforethought, and without authority and without justification and without extenuation by law, did kill and murder the said Martin R. Connelly, and did then and there and thereby commit the crime of murder in the second degree, contrary to the form of the statute in such case made and provided.

A true bill found this 2nd day of October, 1941.

/s/ DANIEL F. McCORRISTON

Foreman of the Grand Jury

/s/ CHAS. E. CASSIDY

Public Prosecutor of the City
and County of Honolulu [12]

Indictment Presented and Filed at 3:05 o'clock
P. M. October 2, 1941.

/s/ M. N. OLDS

Clerk. [10]

In the United States District Court for the
Territory of Hawaii

April Term—1941

In the Matter of the Petition of

JOHN KONG YEUNG

For the Removal of the Criminal Prosecution entitled "The Territory of Hawaii vs. John Kong Yeung, Defendant".

PETITION FOR REMOVAL OF CAUSE

To: The Honorable Judges of the District Court of
the United States for the Territory of Hawaii:

The petition of John Kong Yeung, the defendant
above named, respectfully shows:

I.

That Petitioner, John Kong Yeung, is the defendant in a criminal prosecution, instituted by Indictment in the Circuit Court of the First Judicial Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term 1941, charging Murder in the Second Degree, and entitled "The Territory of Hawaii, Plaintiff vs. John Kong Yeung, Defendant, filed in the office of the Clerk of the said Court on the 2nd day of October, 1941, in the said court and cause.

II.

That said criminal prosecution aforesaid at the instance of Charles E. Cassidy, Public Prosecutor

of the City and County of Honolulu, Territory of Hawaii, on the 2nd day of October, 1941, the Grand Jury of the First Judicial Circuit of the Territory of Hawaii found a true Bill and indicted your petitioner as follows: [14]

“In the Circuit Court of the First Judicial
Circuit, Territory of Hawaii

January Term 1941

Murder in the Second Degree

THE TERRITORY OF HAWAII

vs.

JOHN KONG YEUNG,

Defendant.

INDICTMENT

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that John Kong Yeung, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 22nd day of September, 1941, with force and arms, unlawfully, feloniously, wilfully, and of his malice aforethought, and without authority and without justification and without extenuation by law, in and upon one Martin R. Connelly, a human being then and there being, a felonious assault did make; and that he, the said John Kong Yeung, with a certain pistol loaded with gunpowder and bullets, which he, the said John

Kong Yeung, in his hand then and there had and held, at and against the body of him, the said Martin R. Connelly, unlawfully, feloniously, wilfully, and of his malice aforethought, and without authority and without justification and without extenuation by law did shoot off and discharge; and the said John Kong Yeung, with the pistol aforesaid, by the shooting and discharging aforesaid, did then and there give to him, the said Martin R. Connelly, a certain mortal wound of which said mortal wound the said Martin R. Connelly did, on the said 22nd day of September, 1941, die; and that so in manner and form aforesaid, and at the time and place aforesaid, the said John Kong Yeung unlawfully, feloniously, wilfully and of his malice aforethought, and without authority and without [15] justification and without extenuation by law, did kill and murder the said Martin R. Connelly, and did then and there and thereby commit the crime of murder in the second degree, contrary to the form of the statute in such case made and provided.

A true bill found this 2nd day of October, 1941.

DANIEL F. McCORRISTON

Foreman of the Grand Jury.

CHAS. E. CASSIDY

Public Prosecutor of the City
and County of Honolulu.”

III.

That said indictment and criminal prosecution so instituted against the petitioner is still pending and no trial nor final hearing thereof has as yet taken place, in said Circuit Court of the First Judicial Circuit, City and County of Honolulu, Territory of Hawaii, as aforesaid, though filed with the Clerk of said Court.

IV.

That the above criminal prosecution and indictment against your petitioner for the crime of murder in the second degree is based on the following facts:

That on the 22nd day of September, 1941, and for many years prior thereto, and at all times herein-after mentioned, your petitioner was and now is a duly appointed, qualified and acting officer, guard and employee of the Bureau of Customs, United States Treasury Department of the United States of America; that as such officer, agent and customs guard of said Bureau of Customs, it was, and at all times still is, the duty of petitioner to investigate and report violations of the Tariff Act, Bureau of Customs, United States Treasury Department, and its rules and regulations for the protection of the Revenue of the United States, and further to guard and inspect merchandise in customs custody and to prevent the illegal or irregular landing or delivery of imported merchandise or persons and/or packages in the Territory of Hawaii. [16]

V.

That at said time, date and place in said City and County of Honolulu and at all times herein mentioned, your petitioner was on guard by virtue of his appointment as such customs guard, dressed in his coat, hat and badge and complete official uniform of such customs guard as prescribed by the laws and regulations of the Bureau of Customs, United States Treasury Department, in the performance of his duties as authorized and assigned by his superior officer, the United States Collector of Customs for the Territory of Hawaii, or his deputy and/or duly appointed officer on Pier 8, whereat the S. S. Cleveland a vessel or vehicle was docked and fastened to said Pier 8, discharging passengers, merchandise and packages; further that at said time and place your petitioner in the performance of his duties as such customs guard was authorized to stop and search and arrest any person or vehicle leaving the said vessel, and the said Pier 8, and to open and examine packages in the possessions of such persons; and further that your petitioner was and is authorized to make seizures of any merchandise or package which has been illegally landed from said vessel, or vehicle or taken from said Pier or warehouse without a permit therefore, in the protection and administration of the Tariff Act and the rules and regulations of the Bureau of Customs and the Secretary of the United States Treasury Department.

VI.

That at said time and place and at all times herein mentioned, Martin R. Connelly, a human being then and there being, was a passenger on the said vessel, the S. S. Cleveland, docked at said Pier 8, and was leaving said vessel and said Pier 8 with a package on his person without a permit for the same, that your petitioner in the performance of his duties as said customs guard while on guard duty as aforesaid, was lawfully searching the person of said Martin R. Connelly, and was lawfully opening and examining the said package in the possession of said Martin R. Connelly as aforesaid. [17]

VII.

That your petitioner further alleges that at said time and place no murder was committed as alleged in the aforesaid indictment, and that your petitioner is not guilty of the crime alleged in said indictment. Further that your petitioner is not guilty of any crime or offense whatsoever against the Territory of Hawaii, but on the other hand your petitioner alleges that said death occurred on said date, time and place, in the accidental firing and discharging of said pistol aforesaid in the necessary self defense of your petitioner, while your petitioner was lawfully engaged in the discharge and performance of his duty, as a customs officer, guard and employee of the Collector of Customs, Treasury Department of the United States of America, for the Territory of Hawaii.

VIII.

That your petitioner after a personal arrest was ordered upon the said indictment and criminal prosecution, is now out of prison and on bail, upon proper bond and security furnished by him.

Wherefore, Your Petitioner prays this Court as follows:

To order the said cause removed for trial to the District Court of the United States for the Territory of Hawaii next to be holden in said district where the said cause is now pending, from the said Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term 1941 aforesaid.

That a Writ of Habeas Corpus cum causa may be awarded and a duplicate thereof be delivered to the Clerk of the Circuit Court of the First Judicial Circuit, City and County of Honolulu, Territory of Hawaii, and that by virtue thereof the Marshal of said district or one of his deputies may take the body of the petitioner into his custody to be dealt with in the cause, according to law, and according to the order of the District Court, or of a judge thereof in vacation;

That the records and proceedings heretofore had in said cause, in said Circuit Court of the First Judicial Circuit, Territory of Hawaii, [18] be removed and transmitted to this court, the United States District Court for the Territory of Hawaii, and thereupon proceed as a cause originally commenced herein, pursuant to the Statute of the United States in such case made and provided; United

States Compiled Statute, Section 1015, being Judicial Code Section 33 as Amended by Act 23, 1916 C. 399; Section 76, Title 28 United States Code Annotated.

Dated: Honolulu, Territory of Hawaii, this 10th day of October, 1941.

JOHN KONG YEUNG

Petitioner

United States of America,
District and Territory of Hawaii—ss.

John Kong Yeung, being first duly sworn, on oath, deposes and says: That he is the Petitioner named herein; that he has read the above and foregoing Petition and knows the contents thereof and that the same is true except as to those matters therein stated on information and belief, and as to those matters he believes them to be true.

JOHN KONG YEUNG

Petitioner

Subscribed and sworn to before me this 10th day of October, 1941.

[Seal]

HATTIE PANG LEE

Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires on June 30, 1945.

I, J. V. Esposito, do certify that I am an Attorney and counselor-at-law of all the courts of the Territory of Hawaii, and of the United States District Court for the Territory of Hawaii, and of the United States Circuit Court of Appeals for the Ninth Circuit; that as counsel for the Petitioner above named, I have examined the proceedings against him and carefully inquired into all matters set forth in the Petition; and that the same is true to the best of my knowledge, information and belief.

Dated: Honolulu, Territory of Hawaii, this 10th day of October, 1941.

J. V. ESPOSITO

Attorney for Petitioner.

[Endorsed]: Filed Oct. 10, 1941. [19]

In the United States District Court for the
Territory of Hawaii

April Term—1941

In the Matter of the Petition of

JOHN KONG YEUNG,

For the Removal of the Criminal Prosecution entitled "The Territory of Hawaii vs. John Kong Yeung, Defendant".

ORDER FOR REMOVAL AND ORDER OF
WRIT OF HABEAS CORPUS CUM CAUSA

This cause coming on to be heard on the petition of John Kong Yeung, defendant in the above enti-

tled suit and cause, for the removal of the said cause from the Circuit Court of the First Judicial Circuit, City and County of Honolulu, Territory of Hawaii, to this court in the United States District Court for the Territory of Hawaii, it is,

Ordered that said suit and cause be removed into this court for trial, and that a Writ of Habeas Corpus cum causa be issued herein, by the Clerk of this Court, directed to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, its clerk and officers and other custodians of the records of said court, to transmit the records and proceedings in the above entitled cause to this Court on Monday, October 13, 1941, at 10 A. M.; and that the Marshall of the United States for the District of the Territory of Hawaii take the body of the defendant, your petitioner, into his custody to be dealt with in the said cause, according to law and the order of this Court.

Dated: Honolulu, T. H., this 10th day of October, 1941.

INGRAM M. STAINBACK

Judge, United States District
Court, Territory of Hawaii.

[Endorsed]: Filed Oct. 10, 1941. [21]

In the United States District Court for the
Territory of Hawaii.

April Term—1941

H. C. No. 293

In the Matter of the Petition of

JOHN KONG YEUNG,

For the Removal of the Criminal Prosecution entitled "The Territory of Hawaii vs. John Kong Yeung, Defendant".

WRIT OF HABEAS CORPUS CUM CAUSA
[22]

United States of America,
District of Hawaii—ss.

The President of the United States of America to
the Circuit Court of the First Judicial Circuit,
Territory of Hawaii, to the Clerk of the Circuit
Court of the First Judicial Circuit, Territory
of Hawaii; to the Marshal of the United States
for the District of the Territory of Hawaii,

Greeting:

You are commanded to make known to the Circuit Court of the First Judicial Circuit, Territory of Hawaii and to the Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, that whereas the defendant, John Kong Yeung, and now petitioner in this Writ has filed his petition before the undersigned, setting forth that a bill of indict-

ment was returned into the Circuit Court of the First Judicial Circuit, Territory of Hawaii, by the Grand Jury at the January Term, 1941 of said Court, charging said defendant with the offense of Murder in the Second Degree, upon the person of one Martin R. Connelly, and whereas, the said defendant showeth in his said petition that at the time of the alleged offense he was a customs guard, officer and employee of the Bureau of Customs, United States Treasury Department, for the District and Territory of Hawaii, and being a customs guard, officer and employee of the said Bureau of Customs, United States Treasury Department, for the District and Territory of Hawaii, was acting by his authority and by virtue of such appointment and authority was an actor in the aforesaid accidental death complained of.

And whereas, he has demanded in his said petition the removal of the aforesaid indictment into the District Court of the United States for the District and Territory of Hawaii, under section 33 of the Judicial Code of the United States.

Now, therefore, you are commanded to make known to the said Circuit Court of the First Judicial Circuit, Territory of Hawaii, by [23] the delivery of a copy hereof to the clerk of said court or by leaving it at his office, that the said cause is hereby removed for trial into the said District Court of the United States for the District and Territory of Hawaii, next to be holden for the said district

at the City and County of Honolulu, Territory of Hawaii, on the 13th day of October, 1941.

And that it is entered on the docket of said District Court of the United States for the Territory of Hawaii, and will be proceeded with as a cause originally commenced in said court; and further that it is required of said Circuit Court of the First Judicial Circuit, Territory of Hawaii, to send and transmit to the said District Court of the United States for the Territory of Hawaii, distinct and plainly under the seal of said Circuit Court of the First Judicial Circuit, Territory of Hawaii, a transcript of the record and proceedings in said cause in that case in that court with all the things touching the same by whatever name the party may be called so that we may have him before the judges of the said District Court of the United States for the Territory of Hawaii, at the time and place aforesaid, to-wit, at Honolulu, T. H., on the 13th day of October, 1941 at 10 a. m.; and further to do, therefore, what of right we shall see fit to be done.

Herein fail not and have you then and there this writ.

Witness, the Honorable Ingram M. Stainback, Judge of the United States *District for* the Territory of Hawaii, in the City and County of Honolulu, District and Territory of Hawaii, and the seal of said Court this 10th day of October, 1941.

WM. F. THOMPSON, JR.

Clerk, United States District
Court for the Territory of
Hawaii. [24]

UNITED STATES MARSHAL'S RETURN

Received the within Writ of Habeas Corpus Cum Causa this 10th. day of October, A. D. 1941 and the same is returned duly executed this 10th. day of October, A. D. 1941 by delivering to and leaving with James K. Trask, Deputy Clerk of Circuit Court, First Judicial Circuit, at Honolulu, Territory of Hawaii a certified copy of the original Writ at 12:09 p. m.

OTTO F. HEINE

U. S. Marshal

District of Hawaii. [24-A]

In the United States District Court for the
Territory of Hawaii

April Term—1941

Habeas Corpus

No. 293

In the Matter of the Petition of

JOHN KONG YEUNG,

For the Removal of the Criminal Prosecution entitled "The Territory of Hawaii vs. John Kong Yeung, Defendant".

MOTION TO QUASH

To: The Honorable Judges of the District Court of
the United States for the Territory of Hawaii:
Comes now the Territory of Hawaii, appearing

specially for the purpose of this motion by Chas. E. Cassidy, Public Prosecutor of the City and County of Honolulu, and moves that the Writ of Habeas Corpus Cum Causa issued out of and by this Court in the above entitled cause on the 10th day of October, 1941, be quashed and held for naught, and for grounds thereof your movant respectfully shows and avers:

I.

That the facts set forth in the petition of the above named John Kong Yeung for said writ are insufficient to give this Court jurisdiction over the cause sought by said petition to be removed to this Court.

II.

That the said petition fails to disclose sufficient facts to enable this Court to determine whether the cause covered by said petition is one which may be removed to this Court.

III.

That said petition is vague, indefinite and uncertain.

IV.

That said petition is insufficient and incomplete in that the same fails to candidly, specifically and positively disclose and explain [26] the petitioner's relation to the transaction covered by and set forth in the indictment returned by the Grand Jury of the First Judicial Circuit of the Territory of Hawaii charging the said John Kong Yeung with murder in the second degree.

Wherefore it is prayed that the said Writ of Habeas Corpus Cum Causa be quashed and that the said cause of the Territory of Hawaii v. John Kong Yeung be remanded to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

Dated at Honolulu, T. H., this 11th day of October, A. D. 1941.

TERRITORY OF HAWAII

By CHAS. E. CASSIDY

Public Prosecutor of the City
and County of Honolulu

NOTICE

To: J. V. Esposito, Esq.,
Attorney for John Kong Yeung,
Petitioner.

You will please take notice that the foregoing Motion will be presented for hearing and argument before the Honorable Ingram M. Stainback, Judge of the above entitled Court, in his courtroom in the Federal Building, Honolulu, Territory of Hawaii, on the 13th day of October, 1941, at 10 o'clock A. M. or as soon thereafter as counsel may be heard.

Dated at Honolulu, T. H., this 11th day of October, A. D. 1941.

CHAS. E. CASSIDY

Public Prosecutor of the City and
County of Honolulu.

Attorney for Territory of Hawaii

Receipt of a copy of the above and Motion to Quash is hereby acknowledged this 11th day of October A. D. 1941.

J. V. ESPOSITO

By H. LEE

Attorney for Petitioner

[Endorsed]: Filed Oct. 11, 1941. [27]

In the United States District Court for the
Territory of Hawaii

April Term—1941

In the Matter of the Petition of

JOHN KONG YEUNG,

For the Removal of the Criminal Prosecution entitled "The Territory of Hawaii vs. John Kong Yeung, Defendant".

AMENDED PETITION FOR REMOVAL
OF CAUSE

To: The Honorable Judges of the District Court of
the United States for the Territory of Hawaii:

The amended petition of John Kong Yeung, the defendant above named, respectfully shows:

I.

That Petitioner, John Kong Yeung, is the defendant in a criminal prosecution, instituted by Indict-

ment in the Circuit Court of the First Judicial Circuit *Court of the First Judicial Circuit*, Territory of Hawaii, January Term 1941, charging Murder in the Second Degree, and entitled "The Territory of Hawaii, Plaintiff vs. John Kong Yeung, Defendant, filed in the office of the Clerk of the said Court on the 2nd day of October, 1941, in the said court and cause.

II.

That said criminal prosecution aforesaid at the instance of Charles E. Cassidy, Public Prosecutor of the City and County of Honolulu, Territory of Hawaii, on the 2nd day of October, 1941, the Grand Jury of the First Judicial Circuit of the Territory of Hawaii found a true Bill and indicted your petitioner as follows: [29]

"In the Circuit Court of the First Judicial
Circuit, Territory of Hawaii
January Term 1941
Murder in the Second Degree

THE TERRITORY OF HAWAII

vs.

JOHN KONG YEUNG,

Defendant.

INDICTMENT

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that John

Kong Yeung, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 22nd day of September, 1941, with force and arms, unlawfully, feloniously, wilfully, and of his malice aforethought, and without authority and without justification and without extenuation by law, in and upon one Martin R. Connelly, a human being then and there being, a felonious assault did make; and that he, the said John Kong Yeung, with a certain pistol loaded with gunpowder and bullets, which he, the said John Kong Yeung, in his hand then and there had and held, at and against the body of him, the said Martin R. Connelly, unlawfully, feloniously, wilfully, and of his malice aforethought, and without authority and without justification and without extenuation by law, did shoot off and discharge; and the said John Kong Yeung, with the pistol aforesaid, by the shooting and discharging aforesaid, did then and there give to him, the said Martin R. Connelly, a certain mortal wound of which said mortal wound the said Martin R. Connelly did, on the 22nd day of September, 1941, die; and that so in manner and form aforesaid, and at the time and place aforesaid, the said John Kong Yeung unlawfully, feloniously; wilfully, and of his malice aforethought, and without authority and without justification and without extenuation by law, did kill and murder the said Martin R. Con-

nelly, and did then and there and thereby commit the crime of murder in the second degree, [30] contrary to the form of the statute in such case made and provided.

A true bill found this 2nd day of October, 1941.

DANIEL F. McCORRISTON

Foreman of the Grand Jury.

CHAS. E. CASSIDY

Public Prosecutor of the City
and County of Honolulu.”

III.

That said Indictment and criminal prosecution so instituted against the petitioner is still pending and no trial nor final hearing thereof has as yet taken place, in said Circuit Court of the First Judicial Circuit, City and County of Honolulu, Territory of Hawaii, as aforesaid, though filed with the Clerk of said Court.

IV.

That the above criminal prosecution and indictment against your petitioner for the crime of murder in the second degree is based on the following facts:

That on the 26th day of November, 1926, the petitioner was duly appointed by the Secretary of Treasury, of the United States of America, by his duly authorized officers, and then and there duly qualified on oath as a federal officer, employee and customs guard of the Bureau of Customs, Treasury

Department, United States of America, for the Territory of Hawaii, at the City and County of Honolulu; that from said date and place, up to and including the date of this amended petition, your petitioner has been continuously employed and engaged as such duly appointed and qualified federal officer, employee and customs guard, as aforesaid, of the Bureau of Customs, United States Treasury Department.

V.

That the Customs Guard duties as made and provided by the Tariff Act of 1930, Sec. 581; Article 1381 of Customs Regulation 1937, Treasury Department, United States of America, in force at said time and place are as follows: [31]

“Art. 1381. Duties generally.—(a) Customs guards are appointed to guard merchandise in customs custody and to prevent the illegal or irregular landing or delivery of imported merchandise. They are required to remain on duty until the arrival of the relief guard or until permitted to depart by a superior officer. They must keep a vigilant watch over the vessel, vehicle, stores, or pier to which assigned and prevent the landing or removal of merchandise in the absence of the customs officer in charge.

(b) Customs guards will not interfere with a vessel taking on coal, ballast, or cargo not in bond at night or at other times in the absence of an inspector, provided a permit therefor is exhibited.

(c) Customs guards in the performance of their duties are authorized to stop and search any person or vehicle leaving a vessel or pier to which they are assigned and to open and examine packages in the possession of such persons. Searches of persons should be made, if practicable, in the presence of another officer or person. They also have authority to arrest any person detected in the act of smuggling and to call for the assistance of the police or of any person to aid them in so doing. They are also authorized to make seizures of any merchandise which has been illegally landed from any vessel or vehicle or taken from a pier or warehouse without a permit therefor." (Tariff Act of 1930, sec. 581)

VI.

That on the 21st day of September, 1941, in the City and County of Honolulu, Territory of Hawaii, from 11:00 P. M. of said day to 7:00 A. M. of the 22nd day of September, 1941, and at all times herein mentioned, your petitioner was assigned, by his immediate superior officer, Inspector George Roberts, in charge of said Customs Guard Service, as such duly appointed, qualified and acting federal officer, employee and customs guard, to the duty of a customs guard on and at Pier 8, whereat the S. S. Cleveland, a vessel, was docked and fastened to said Pier 8, discharging foreign cargo, goods, wares and merchandise, passengers with baggage and packages

in their possession at the Port of Honolulu, City and County of Honolulu, Territory of Hawaii.

VII.

That on the 22nd day of September, 1941, at or about 1:00 A. M., at said Pier 8, in said Honolulu, the petitioner, while in the performance of his official duties as such customs guard, as aforesaid, [32] was lawfully assigned and stationed on customs guard duty, standing beside a table within the baggage and passenger enclosure of said Pier 8, about forty to fifty feet away from said vessel at dock, guarding and watching the pass-gate proper and passenger exit, investigating, inspecting and examining persons, goods, wares and merchandise leaving the said vessel and said Pier 8; further that at said time and place, the petitioner in the performance of his official duties as such customs guard, was authorized to stop, search and/or arrest any person leaving said vessel and Pier, contrary to the laws of the United States, as made and provided in such cases; and further, your petitioner was authorized to open, examine, search and make seizures of any goods, wares and merchandise or package, which had been illegally landed from said vessel, or taken and carried from said Pier 8 or warehouse without a proper permit, or without inspection or examination by a duly authorized officer, agent or employee of the said Customs Service as aforesaid.

VIII.

That at said time and place, and at all times herein mentioned, your petitioner as such federal officer and Customs guard, in the service of customs, while engaged in the performance of his official duties, and/or, on account of the performance of his official duties, was dressed and wore the complete official uniform as prescribed by the rules and regulations of Customs Regulations of the year 1937, Treasury Department, United States of America, as made and provided by Article 1326 of said Customs Regulation: to-wit, regulation cap with metal emblem of "U. S. Customs Guard". Regulation uniform of coat, and trousers with Regulation metal custom's badge conspicuously displayed on the left side of said coat, bearing the following insignia, U.S. Customs Guard, Treasury Department, No. 2765.

[33]

IX.

That your petitioner, at all times herein mentioned, carried firearms, to-wit: a Regulation Colt Pistol, No. 38, at his belt and holster, conspicuously displayed, while in the performance of his official duties, within the scope of his employment as herein mentioned as made and provided by laws and regulations to wit: Article 1125 of Customs Regulation of the year 1937, Treasury Department, United States of America.

That your petitioner, for a long time prior to the said 22nd day of September, and at all times herein mentioned, had been thoroughly instructed in the

proper care and use of said weapon and regulation pistol Colt No. 38. That your petitioner alleges that the said firearms and Regulation Colt Pistol No. 38 had been and is repeatedly and periodically examined and inspected by his superior officer and that said firearms and pistol as aforesaid was kept by your petitioner in first class condition for proper use.

X.

That at said time and place, Martin R. Connelly, a human being then and there being, was a passenger on the vessel, S. S. Cleveland docked at said Pier 8, and was leaving said vessel and said Pier 8, with a package on his person and in his possession without a proper permit for the same, and upon his approach to and arrival near, the pass-gate proper, and passenger exit, within the said baggage and passenger enclosure fenced in, at said Pier 8, where your petitioner was duly stationed near said table, in the performance of his official duties, the said Martin R. Connelly attempted to leave said Pier 8, by passing through the said pass-gate proper without inspection or examination of the said package he was carrying, whereupon your Petitioner, on guard at said pass-gate politely informed said Martin R. Connelly to place said package on the table, and open it, so that your petitioner [34] could inspect and examine it for customs duty, if any, as such customs guard. The said Martin R. Connelly refused to open the said package for the inspection of your petitioner and thereby slammed the said pack-

age with great force on said table. Your petitioner thereupon informed the said Martin R. Connelly—that if he refused to open said package for inspection of the customs guard, he would have to return said package to the ship or words to that effect. Your petitioner thereafter, in the performance of his official duties as such customs guard, attended to other official business of passengers and persons passing and repassing said entrance and exit gates fenced off at said Pier 8, near the docked vessel at the proper enclosure assigned and allotted the Customs Service as made and provided by rules and regulations; when without warning or any notice whatsoever, the said Martin R. Connelly attempted to forcibly push his way with said package through said exit gate, and thereby leave said Pier 8, without inspection or examination of said package, all contrary to rules and regulations as made and provided; that your Petitioner quickly stepped in said passage way and blocked the exit opening and thereby prevented the escape of said Martin R. Connelly, with said package, and again your petitioner politely and properly informed him “You can’t take it out unless you open it”, meaning thereby, the said package in the possession of said Martin R. Connelly; that the said Martin R. Connelly replied to your petitioner, “You open it”, and thereupon the petitioner said, “You insist, I open it”, and proceeded thereupon to open, inspect and examine said package and upon finding no contraband, declared the said package “all right”.

Thereupon, the said Martin R. Connelly, placing both of his hands on his chest, requested and invited your petitioner to examine and search his person for any contraband, and smuggled goods, wares and merchandise; that your petitioner, upon the request of the said Martin R. Connelly, replied as follows:—"if you insist, I will search you", and immediately your petitioner began a proper and careful search of the person of said Martin R. Connelly, [35] as requested, and formally and gently frisked the clothing of said Martin R. Connelly, in the lawful performance of his official duties, and on account of the lawful performance of his duty, under color of office and within the scope of his employment and not without the scope of said employment, when suddenly and without warning or notice of any kind whatsoever, and without reason, cause or provocation upon the part of the petitioner in the premises, the said Martin R. Connelly, forcibly, unlawfully and with great violence, struck your petitioner upon the jaw and face, with his closed hand and clenched fist, with terrific force and power, severely and painfully injuring your petitioner, and as a direct result of the force of said blow, your petitioner was momentarily dazed and confused, and pushed backward and away from said Martin R. Connelly; that immediately your petitioner shouted from pain, exclaiming "You hit me"—meaning the said Martin R. Connelly was under arrest, and thereupon drew his said Regulation pistol and firearm from his said belt and

holster and pointed the same at the said Martin R. Connelly. That your petitioner at said time and place, was acting with the lawful intent and purpose of placing the said Martin R. Connelly under lawful arrest, for the commission of a felony, to-wit; for knowingly and forcibly resisting, opposing, impeding, intimidating or interfering with your petitioner, a federal officer, employee, agent or other person in the service of the customs as designated in Section 253 of Title 18, United States Code Annotated, while your petitioner was engaged in the performance of his duties, and/or knowingly and forcibly assaulting and attacking your petitioner on account of the performance of his official duties as herein alleged, all contrary to law as made and provided by Section 254 of Title 18, United States Code Annotated;

secondly; your petitioner acted as aforesaid, with the lawful intent and purpose of preventing the said Martin R. Connelly from the commission of a further and another felony, as prohibited by Sections 253-254 of said [36] Title 18, United States Code Annotated;

thirdly; that your petitioner acted as aforesaid, because of the unlawful acts, threats and conduct of said Martin R. Connelly as aforesaid, your petitioner was put in fear of bodily harm and his life being in danger, under and upon the premises and allegations as herein alleged, and your petitioner reasonably acted in the necessary preservation of his life, and in his necessary self-defense.

XI.

That immediately thereafter or almost concurrently with the act of your petitioner in the drawing and the pointing of his said pistol as aforesaid, and in the utterance of your petitioner as aforesaid, "You hit me"—"You are under arrest"—the petitioner meaning the said Martin R. Connelly, and later the said Martin R. Connelly as aforesaid then and there, at said time and place, the said Martin R. Connelly, again and again violently and furiously struck and forcibly and unlawfully attacked your petitioner, in a ferocious and malicious manner and did beat and strike your petitioner upon his face and head, so suddenly with both of his clenched hands and closed fists, causing and inflicting excruciating pain and great bodily injury and thereby jeopardizing and endangering the life of your petitioner, that as a direct and proximate result and consequence of the acts, conduct, threats and attack of the said Martin R. Connelly as aforesaid upon your petitioner as aforesaid, your petitioner was hurled backward and was staggered and his mind became confused and blank and not under the control of his will and faculty.

XII.

That some time thereafter, the exact length of time is unknown to your petitioner, your petitioner heard a loud report, as if and like the explosion of a cartridge and firearm, and saw the said Martin R. Connelly fall to the cement floor towards your

petitioner near said table within the said Pier 8 enclosure, near said pass-gate, and [37] passenger exit on said Pier 8, as made and provided and duly allotted to the customs service by the rules and regulations of the Bureau of Customs, Treasury Department, United States of America; further, that all of the aforesaid took place at said time and place, while your petitioner was in actual performance of his official duties as customs guard and on account of the performance of said official duties, and within the scope of his employment and under color of his office, in the protection of the United States Revenue, and in the enforcing and protection of the laws and rules and regulations as made and provided and as herein mentioned and alleged, all without fault, or carelessness on the part of your petitioner, and without malice and without unlawful intent upon the part of your petitioner.

XIII.

That your petitioner has made an intensive search and investigation of, and concerning, the said Martin R. Connelly, and upon information and belief, has learned and verily believes, and upon said information and belief, alleges the facts to be, that said Martin R. Connelly was a young adult male of about 25 years of age, of an athletic stature and great muscular physique and capable of inflicting powerful and terrific blows in the exercise of great feats of strength: further, that he was possessed of a quick, violent state of mind, and a ferocious tem-

per and quarrelsome disposition; that at all times herein mentioned, the said Martin R. Connelly was fully aware and had actual knowledge of the premises herein mentioned, and further, that he had actual knowledge, that your petitioner was a duly appointed and legally qualified federal officer, employee, and United States customs guard of the Treasury Department in the performance of his official duties under color of his office, within the scope of his employment, and in the protection of the Revenue of the United States of America and in the prevention of the commission of felonies, in regards to smuggling of goods, wares and merchandise, in regards to the resisting, obstructing and assaulting your petitioner as said federal officer. [38]

XIV.

That your Petitioner further alleges, that at said time and place, and at all times herein mentioned, no murder was committed as alleged in the foresaid indictment, by your petitioner, further, that your petitioner is *no* guilty of any crime alleged in said indictment and not guilty of any crime or offense of any kind whatsoever, against the Territory of Hawaii, but on the other hand your petitioner alleges that the said death occurred on the said date, time and place in the accidental firing of discharging of the said pistol and firearm as aforesaid and in the necessary self defense of your petitioner; further, that all of the acts and conduct of your

petitioner were performed in the official conduct of his official duties, and on account of the performance of his official duties, as herein alleged and under color of office as said federal officer, employee and customs guard, in the protection of the United States Revenue and in the prevention of smuggling of foreign goods, wares and merchandise imported from foreign countries to the Territory of Hawaii, United States of America and in the protection and enforcing of the laws of the United States as made and provided in such cases; further your petitioner was acting and did act lawfully, with the lawful intent and purpose of placing the said Martin R. Connelly under lawful arrest, for the commission of a felony, to wit: for knowingly and forcibly resisting, opposing, impeding, intimidating or interfering with your petitioner, a federal officer, employee, agent or other person in the service of the customs as designated in Section 253 of Title 18, United States Code Annotated, while your petitioner was engaged in the performance of his duties, and/or knowingly and forcibly assaulting and attacking your petitioner on account of the performance of his official duties as herein alleged, all contrary to law and made and provided by Section 254 of Title 18, United States Code Annotated; secondly; your petitioner acted as aforesaid, with the lawful intent and purpose of preventing the said Martin R. Connelly from the commission of a further and another felony, as prohibited by Sections 253-254 of said Title 18, United States

Code Annotated; [39] thirdly; that your petitioner acted aforesaid, because of the unlawful acts, threats and conduct of said Martin R. Connelly as aforesaid, your petitioner was put in fear of bodily harm and his life being in danger, under and upon the premises and allegations as herein alleged, and your petitioner reasonably acted in the necessary preservation of his life, and in his necessary self-defense.

XV.

That petitioner at all times herein mentioned was acting within the scope of his employment in the active performance and discharge of his official duties, as such duly appointed, qualified and acting federal officer, employee and customs guard, as herein mentioned, under color of his office, in the protection and enforcement of the revenue, imports and imposts of the United States of America, and in the protection and enforcement of the Tariff Act and Revenue laws and regulations as made and provided by the United States of America, the Secretary of the Treasury, the Commission of the Bureau of Customs, Treasury Department, his assistants, deputies and duly qualified and appointed officer and agents. That at no time herein mentioned, did your petitioner act outside the scope of his employment or not in the performance nor on account of the performance and discharge of his official duties; neither did your petitioner act outside the color of his office, nor outside the protection and enforcement of the United States Revenue

laws. That all of the acts of your petitioner herein alleged were done in the sincere and honest endeavor and lawful purpose of performing his official duties as aforesaid and without malice, without ill will, and without unlawful intention in all of the premises herein mentioned. That your petitioner after a personal arrest was ordered and made upon said indictment and criminal prosecution, is now out of prison and on bail, upon proper bond and security furnished by him according to law.

[40]

XVI.

That annexed to this petition, and made part of this petition by reference and incorporation, are attached petitioner's Exhibit No. I, consisting of a true copy of the duplicate Oath of Office of your petitioner, duly qualifying him as a federal officer, and Customs Guard, and dated the 26th day of November, 1926 at said City and County of Honolulu as made and provided by the laws of the United States of America. That petitioner's Exhibit II, also hereto attached and by reference incorporated and made a part of this petition, consists of a true copy of the original on file in the office of the United States Customs Service, Port of Honolulu, Territory of Hawaii, dated September 20, 1941, being an official record of the assignment of Sergeants and Guards on station at Platoons No. 1, 2 and 3, on Sunday of September 21st, 1941, wherein your petitioner was duly and lawfully appointed and assigned as such federal officer and customs guard as

herein mentioned on the 3rd watch of said date from 11:00 P.M. to 7:00 A.M. in Main gate, in charge of 3rd watch, S. S. Cleveland, at said place and at Pier 8 in said City and County of Honolulu, Territory of Hawaii, United States of America.

XVII.

That your petitioner makes the allegations in this petition in a candid, specific and positive asseveration as his best knowledge and belief upon the occurrences, acts and events as herein mentioned and upon all the information, knowledge and investigations that he possesses upon the premises as of date wherein this petition is signed; further, your petitioner denies and positively asserts and alleges and negatives the possibility that your petitioner was engaged in other than the official acts, within the scope of his employment and in performance of and on account of the performance of his official duties as often repeated and alleged in this petition.

Wherefore, your petitioner prays that this Amended Petition be permitted to be filed in addition and as supplemental to the original petition as filed and dated October 10th, 1941, and that said Order of Removal and [41] Writ of Habeas Corpus Cum Causa remain and be in full force and effect as of said time, date and place as on file in the official records of the above entitled court and cause.

Dated: Honolulu, Territory of Hawaii, this 15th day of October, 1941.

JOHN KONG YEUNG
Petitioner.

United States of America,
District and Territory of Hawaii—ss.

John Kong Yeung, being first duly sworn, on oath, deposes and says: That he is the Petitioner named herein; that he has read the above and foregoing Amended Petition and knows the contents thereof and that the same is true except as to those matters therein stated on information and belief, and as to those matters he believes them to be true.

JOHN KONG YEUNG
Petitioner.

Subscribed and sworn to before me this 15th day of October, 1941.

(Seal) HATTIE PANG LEE
Notary Public, First Judicial Circuit,
Territory of Hawaii.

My Commission expires on June 30, 1945.

I, J. V. Esposito, do certify that I am an Attorney and counselor-at-law of all the courts of the Territory of Hawaii, and of the United States District Court for the Territory of Hawaii, and of the United States Circuit Court of Appeals for the Ninth Circuit; that as counsel for the Petitioner above named, I have examined the proceedings

against him and carefully inquired into all matters set forth in the Amended Petition; and that the same is true to the best of my knowledge, information and belief.

Dated: Honolulu, Territory of Hawaii, this 15th day of October, 1941.

J. V. ESPOSITO

Attorney for Petitioner. [42]

[EXHIBIT 1]

OATH OF OFFICE

(2616, 1757 R. S., and Act of May 13, 1884)

I, John Kong Yeung, having been appointed Customs Guard, \$1500 Honolulu, T. H., Collector of Customs do solemnly swear that I will use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports.

And I do further swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

JOHN KONG YEUNG

(Sign name in full)

Sworn and subscribed to before me this 26th day of November, A. D. 1926.

(Seal)

R. J. TAYLOR

Assistant Collector

Note.—If the oath is taken before a Notary Public the date of expiration of his commission should be shown.

TAKE NOTICE

Acts of February 8, 1875, and March 2, 1895 (Title 19, U. S. C., 1934 ed., Sec. 27).—"The oaths required to be taken by subordinate officers of the Customs shall be taken in duplicate, one copy to be transmitted to the Secretary of the Treasury (Bureau of Customs), and the other to be filed with the Collector of Customs for the district in which the officer appointed acts. And in default of taking such oath, or transmitting a certificate thereof, or filing the same with the Collector, the party failing shall forfeit and pay the sum of \$200, to be recovered, with cost of suit, in any court of competent jurisdiction, to the use of the United States."

This oath may be administered by a Customs officer or employee authorized to administer oaths under the provisions of Section 486, Tariff Act of 1930. To be prepared in triplicate, two copies to be forwarded to the Commissioner of Customs, as instructed in Articles 1424 and 1426, C. R. 1937.

Note: I certify that *this a* true copy of the duplicate on file in this office.

(Seal)

(Sgd) WARDE C. HIBERLY

Acting Collector of Customs [43]

[EXHIBIT II]

United States Customs Service

DAILY RECORD AND REPORT OF ASSIGNMENT OF INSPECTORS, GUARDS, LABORERS, ETC.

Port of Honolulu, T. H., September 20, 1941

Record and report of assignment of Sergeants and Guards on station at Platoons Nos. 1, 2, and 3, on Sunday, September 21, 1941

Name	Title	Vessel or Location	Pier	Notations (Laborers assisting, etc.)
George Roberts	Inspector	In Charge		
1st Watch from 7:00 A. M. to 3:00 P. M.				
C. DeMello	Sergeant	In charge of 1st Watch		
N. E. Engeman	Guard	SS Raphael Seemee		Guard Ship
E. G. Wing	Inspector	" " & Pres Cleveland		Search Ship
R. Thomas	Guard	" " "		" "
D. Steffen	"	" " "		" "
O. P. Rice	"	" " "		" "
D. Smith	"	" " "		" "
H. Feikert	"			Waterfront patrol
J. R. Wilson	"	Post No. 1, Clipper		Report at 2:00 P. M.
E. T. Oakley	"			Assgd. to Cashiers Off
F. D. Meacham	"			Off Duty
A. T. Graham	"			On 2nd Watch
A. L. Zane	"			" "

Name	Title	Vessel or Location	Pier	Notations (Laborers assisting, etc.)
2nd Watch from 3:00 M. to 11:00 P. M.				
C. K. Lua	Sergeant	In Charge of end Watch		
D. Leahy	Guard			In Office
F. Pennasilico		SS Pres Cleveland	8	Main Gangway
B. Griswold		" "	8	" " Asst.
Geo. Lawelawe		" "	8	Main Gate
H. Higgins		" "	8	" " Asst.
M. A. Gora		" "	8	Crew Gangway
B. P. Harrison		" "	8	" " Asst.
A. L. Zane		" "	8	Lower end of pier
A. T. Graham		SS Raphael Semmes		Guard ship
C. A. Campbell		Post No. 2, Clipper and Waterfront patrol		
3rd Watch from 11:00 P. M. to 7:00 A. M. 9/21/41				
C. F. Larsen	Sergeant	In Charge of 3rd Watch		
M. R. Estrella	Guard	SS Pres Cleveland		Main gate
E. G. Schultz	"			In Office
J. K. Yeung	"	SS Pres Cleveland	8	Main Gangway
J. Freitas	"	" "	8	Crew Gangway
Note: 1st Aid Class Monday, September 22, 1941, at 7:00 A. M.				

Approved:

I certify that this is a true copy of the original on file in this office.

(Sgd) WARDE C. HIBERLY

Acting Collector of Customs

GEORGE ROBERTS

Inspector of Customs.

[Endorsed]: Filed Oct. 15, 1941. [44]

In the United States District Court for the
Territory of Hawaii

Criminal No. 9466

TERRITORY OF HAWAII

vs.

JOHN KONG YEUNG,

Defendant.

VERDICT

We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find the defendant, John Kong Yeung, guilty of manslaughter.

Dated: Honolulu, T. H., this 28th day of November, 1941.

CYRIL F. DAMON

Foreman of Jury

[Endorsed]: Filed Nov. 28, 1941. [46]

In the United States District Court for the
Territory of Hawaii

Cr. No. 9466

(Murder in the Second Degree).

THE TERRITORY OF HAWAII,

Plaintiff,

vs.

JOHN KONG YEUNG,

Defendant.

JUDGMENT AND COMMITMENT

On this, the 1st day of December, A. D. 1941, came the Public Prosecutor of the City and County of Honolulu, and the above named defendant, John Kong Yeung, appearing in person and by his counsel, J. Garner Anthony, Esq., and J. V. Esposito, Esq., and

The defendant having been heretofore, on, to-wit, the 28th day of November, 1941, convicted upon a verdict rendered by the jury empaneled in this cause of the offense of Manslaughter (Section 5996, Revised Laws of Hawaii, 1935), and included offense in the Indictment returned herein, and the Defendant having been asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the Defendant having been found guilty of Manslaughter is hereby adjudged guilty of such offense and committed to imprisonment at hard labor in Oahu Penitentiary for a period not to exceed ten (10) years, minimum sentence to be later fixed in accordance with law.

It is further ordered that Mittimus herein be stayed until two (2) o'clock P.M. on Friday, the 5th day of December, 1941. [48]

It is further ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

INGRAM M. STAINBACK

Judge, United States District
Court for the Territory of
Hawaii.

[Endorsed]: Filed Dec. 1, 1941. [49]

In the United States District Court
for the District of Hawaii

October Term 1941

IN THE MATTER OF THE CONDUCT OF
THE BUSINESSS OF THIS COURT

ORDER

By reason of the existence of international war involving the United States, and of a consummated

invasion attack and threatened further invasion by armed enemy forces upon this Island of Oahu, Territory of Hawaii, and other Pacific Islands which are under the jurisdiction of this Court, and by reason of a proclamation issued on December 7th, 1941, by the Governor of the Territory of Hawaii suspending the privilege of the Writ of Habeas Corpus and placing the said Territory under Martial Law,

It is hereby ordered that all proceedings in all matters and causes now pending before this Court, be and the same are hereby and henceforth continued until the further order of this Court; and

It is further ordered that the time for filing all answers, motions and, or, other pleadings and papers in causes now pending before this Court, be and the same is hereby extended until the further order of this Court.

Dated this 12th day of December, 1941.

D. E. METZGER

Judge,

United States District Court

District of Hawaii

INGRAM M. STAINBACK

Judge,

United States District Court

District of Hawaii

[Endorsed]: Filed Dec. 12, 1941. [50]

In the United States District Court
for the District of Hawaii

October Term 1941

IN THE MATTER OF THE CONDUCT OF
THE BUSINESS OF THIS COURT

ORDER

It is hereby ordered that the Order of December 12, 1941, continuing until further Order all causes and matters then pending, and extending time until further Order for filing answers, motions, and, or, other pleadings and papers in causes then pending, be and the same is set aside and cancelled.

Dated this 10th day of February, 1942.

D. E. METZGER

Judge

INGRAM M. STAINBACK

Judge

[Endorsed]: Filed Feb. 13, 1942. [51]

[Title of District Court and Cause.]

APPEARANCE OF COUNSEL

Come now Cass & Silver and hereby enter their appearance as counsel for the Defendant above named, to wit, John Kong Yeung.

Dated, Honolulu, T. H. January 29, 1942.

CASS & SILVER

By PHILIP SILVER

[Endorsed]: Filed Jan. 31, 1942. [53]

From the Minutes of the United States District
Court for the Territory of Hawaii

Friday, October 10, 1941

[Title of Court and Cause.]

On this day came the petitioner herein with Mr. J. V. Esposito, his counsel, who presented a petition for removal of criminal proceedings entitled "The Territory of Hawaii, vs. John Kong Yeung," together with an order for removal and order of writ of habeas corpus cum causa and a writ of habeas corpus cum causa. The order for removal and order of writ of habeas corpus cum causa were signed, and ordered filed. The Court ordered that the writ of habeas corpus issue.

The order reads as follows:

"In the Matter of the Petition of JOHN KONG YEUNG, for the Removal of the Criminal Prosecution entitled "THE TERRITORY OF HAWAII vs. JOHN KONG YEUNG, Defendant.

ORDER FOR REMOVAL AND ORDER OF
WRIT OF HABEAS CORPUS CUM
CAUSA

"This cause coming on to be heard on the petition of John Kong Yeung defendant in the above entitled suit and cause, for the removal of the said cause from the Circuit Court of the First Judicial Circuit, City and County of Honolulu, Territory of Hawaii, to this court

in the United States District Court for the Territory of Hawaii, it is,

“Ordered that said suit and cause be removed into this court for trial and that a Writ of Habeas Corpus cum causa be issued herein, by the Clerk of this Court, directed to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, its clerk and officers and other custodians of the records of said court, to transmit the records and proceedings in the above entitled cause to this Court on Monday, October 13, 1941, at 10 A.M. and that the Marshal of the United States for the District of the Territory of Hawaii take the body of the defendant, your petitioner, into his custody to be dealt with in the said cause, according to law and the order of this Court.

“Dated: Honolulu, T. H., this 10th day of October, 1941.

(Signed) INGRAM M. STAINBACK,

Judge,

United States District Court,
Territory of Hawaii [54]

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, October 13, 1941

[Title of Court and Cause.]

On this day came the petitioner herein with Mr. J. V. Esposito, his counsel, and also came Mr.

Charles E. Cassidy, Public Prosecutor, City and County of Honolulu. This case was called for hearing on a motion to quash.

Mr. Cassidy made a statement.

The Court made a statement as to the facts set out in the petition.

Mr. Esposito made a statement and moved to be allowed to file an amendment to the petition.

The Court allowed the petitioner forty-eight hours to file an amended petition. The Court ordered that the amended petition be filed by Wednesday, October 15, 1941 at 10 a.m.

The Court ordered that all motions be heard on Thursday, October 16, 1941 at 10 a.m. [55]

From the Minutes of the United States District
Court for the Territory of Hawaii

Thursday, October 16, 1941

[Title of Court and Cause.]

On this day came the petitioner herein with Mr. J. V. Esposito, his counsel, and also came Mr. Charles E. Cassidy, Public Prosecutor and Mr. W. Z. Fairbanks, Deputy Public Prosecutor, City and County of Honolulu, counsel for the respondent. This case was called for hearing.

Mr. Cassidy stated that he would not file any motion and consented to the trial of this case in this court.

The defendant entered a plea of not guilty as charged in the indictment.

Mr. Cassidy asked that this case be set for trial during the week beginning with October 20, 1941.

Mr. Esposito asked for further time.

The Court ordered that this case be continued to Monday, October 20, 1941 at 9 a.m. Mr. Esposito entered an exception to the setting of the case. [56]

From the Minutes of the United States District
Court for the Territory of Hawaii

Saturday, October 18, 1941

[Title of Court and Cause.]

On this day came the petitioner herein with Mr. J. V. Esposito, his counsel, and also came Mr. Charles E. Cassidy, Public Prosecutor, City and County of Honolulu. This case was called for hearing on a motion for continuance.

Argument was had by respective counsel on said motion.

The Court ordered that this case be continued to Monday, October 27, 1941 at 9 a.m. for trial. [57]

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, October 27, 1941

[Title of Court and Cause.]

On this day came the applicant herein with Mr. J. V. Esposito, his counsel, and also came Mr. Charles E. Cassidy and Mr. W. Z. Fairbanks, Public Prosecutors, City and County of Honolulu, Territory of Hawaii. Mr. Angus M. Taylor, United States Attorney, appeared and stated that he had been instructed by the Attorney General to appear as special counsel for the purpose of filing a motion for continuance and arguing said motion. This case was called for hearing on a motion for continuance.

Argument was had by Mr. Taylor and Mr. Esposito in support of the motion for continuance.

Argument was had by Mr. Cassidy in opposition to the motion.

Further argument was had by Mr. Taylor.

The witnesses were ordered to leave the court room.

Further argument was had by Mr. Esposito.

Frederick H. Gardner, Supervising Customs Agent, at San Francisco, California, was called and sworn and testified.

Further statements were made by Mr. Cassidy, Mr. Taylor and Mr. Esposito.

The Court ordered that this case be continued to October 30, 1941 at 9 a.m. to be re-set for trial.

From the Minutes of the United States District
Court for the Territory of Hawaii

Thursday, October 30, 1941

[Title of Court and Cause.]

On this day came Mr. Charles E. Cassidy, Public Prosecutor, City and County of Honolulu, and Mr. W. Z. Fairbanks, Deputy Public Prosecutor, and also came Mr. J. V. Esposito, counsel for the defendant and with said defendant. Mr. Angus M. Taylor, Jr., United States Attorney, made a special appearance as special counsel for the defendant on the motion for continuance.

Frederick H. Gardner, Supervising Customs Agent, 14th Customs Division, was called and sworn and testified.

Statements were made by Mr. Taylor, Mr. Cassidy and Mr. Esposito.

The Court ordered that this case be set for trial on Thursday, November 13, 1941 at 9 a.m. Mr. Taylor entered an exception.

The Court ordered that this case be continued to Friday, October 31, 1941 for hearing on the motion to quash venire and motion to transfer cause to the County of Maui, Territory of Hawaii. [59]

From the Minutes of the United States District
Court for the Territory of Hawaii

Friday, October 31, 1941

[Title of Court and Cause.]

On this day came Mr. Charles E. Cassidy, Public Prosecutor, City and County of Honolulu and Mr. W. Z. Fairbanks, Assistant Public Prosecutor, and also came the defendant John Kong Yeung with Mr. J. V. Esposito, his counsel.

This case was called for hearing on a motion to quash *venire* and a motion for removal of cause.

The affidavits of Henry A. Nye and James B. Mann were presented by Mr. Cassidy and ordered filed.

The Honolulu Star-Bulletin for September 22, 24, and 27, 1941, the Honolulu Advertiser for September 23, and 26, 1941, and the Sentinel for September 25, and October 16, 1941, were offered by Mr. Esposito in support of the motion for change of venue, admitted in evidence and ordered filed.

Opening argument was had by Mr. Esposito in support of the motion.

Argument was had by Mr. Fairbanks resisting the motion to quash *venire*.

The motion to quash *venire* was overruled. Mr. Esposito entered an exception.

Argument was had by Mr. Cassidy resisting the motion for change of *venire*.

The Court ordered that this case be continued to 2 p.m. this day for further argument.

At 2:05 p.m. the Sentinel for October 30, 1941 was submitted by Mr. Esposito.

The Honolulu Star Bulletin for September 23, 1941 was submitted by Mr. Cassidy. Said newspapers were admitted in evidence. [60]

Argument was had by Mr. Cassidy.

Argument was had by Mr. Esposito.

The motion for change of venue was denied. Mr. Esposito entered an exception. [61]

From the Minutes of the United States District
Court for the Territory of Hawaii

Thursday, November 13, 1941

[Title of Court and Cause.]

The Court ordered that further proceedings in this matter shall be conducted under the title of "Territory of Hawaii, plaintiff, vs. John Kong Yeung, defendant, Criminal No. 9466 of this court.

Criminal No. 9466

The Territory of Hawaii

vs.

John Kong Yeung

On this day came Charles E. Cassidy, Public Prosecutor and Mr. W. Z. Fairbanks, Deputy Public Prosecutor, Territory of Hawaii, counsel for the plaintiff herein and also came the defendant

herein with Mr. J. V. Esposito, his counsel. Upon motion of Mr. J. Garner Anthony his name was entered of record as special counsel for the defendant. This case was called for trial.

The following jurors were duly empaneled and sworn to try the issues herein: Percy J. Levey, Edward A. Goeas, Matsuo Matsugama, Cyril F. Damon, Orlando A. Schoening, George K. Furuya, Charles T. Littlejohn, Jr., Ralph H. E. Schmidt.

At 11:59 a.m. the Court ordered that this case be continued to 2 p.m. this day.

At 2 p.m. the court reconvened. It was stipulated the jury and all parties were present.

The following jurors were empaneled to try the issues herein: Frank T. Sullivan, Charles W. Weatherwax, Charles B. Cooper, Jr., De Witt McCloskey.

At 3 p.m. the jury was sworn. [62]

From the Minutes of the United States District
Court for the Territory of Hawaii

Friday, November 28, 1941

[Title of Court and Cause.]

On this day came Mr. Charles E. Cassidy, Public Prosecutor, and Mr. W. Z. Fairbanks, Deputy Public Prosecutor, City and County of Honolulu, appearing for the prosecution, and also came Mr. J. G. Anthony, Special Assistant United States

Attorney, and Mr. J. V. Esposito, counsel for the defendant herein and with said defendant. This case was called for argument to the jury.

It was stipulated that the jury heretofore empaneled and sworn to try the issues herein and the defendant were present. All parties being present the further trial of this case proceeded as follows:

At 10:12 a.m. argument was had to the jury by Mr. Cassidy.

At 11:25 a.m. argument was had by Mr. Esposito to the jury.

At 12 noon the Court continued this case to 1:30 p.m. this day.

At 1:36 p.m. Mr. Esposito continued his argument to the jury.

At 2:48 p.m. Mr. Anthony argued to the jury.

At 3:40 p.m. Mr. Fairbanks argued to the jury.

At 4:37 p.m. the Court instructed the jury.

The defense excepted to the Court's giving Territory's requested instructions Nos. 3, 4, 7-g, 11, 7-F and 7-B. The defense entered an exception to the Court's refusal to give the defendant's requested instructions No. 1 and No. 8.

The Court appointed Mr. Cyril F. Damon foreman of the jury. Otto F. Heine, Marshal and T. R. Clark and G. E. Bruns, Deputy Marshals, were sworn to take charge of the jury during its deliberations. At 5:07 p.m. the jury retired in charge of the bailiffs to deliberate upon a verdict. [63]

At 5:24 p.m. it was stipulated by respective counsel and ordered by the Court that the words "this

defendant” on line seven of the Court’s instruction No. 22 be stricken and the word “he” inserted after the word “indicate” on line 18 of the same instruction; that the last part of the second paragraph of the Court’s Instruction No. 15 following the semicolon be stricken.

At 6:05 p.m. the jury was taken to dinner.

At 7:55 p.m. the jury returned from dinner and retired to deliberate upon a verdict.

At 9:52 p.m. the jury returned the following verdict:

“Verdict

“We, the jury, duly empaneled and sworn in the above entitled cause, do hereby find the defendant, John Kong Yemng, guilty of manslaughter.

“Dated: Honolulu, T. H., this 28th day of November, 1941.

(Signed) CYRIL F. DAMON

Foreman of Jury.”

The defense excepted to the verdict as contrary to law, the evidence and the weight of the evidence and gave notice of motion for a new trial.

Upon request of the defense the matter of sentence was continued to Monday, December 1, 1941, at 9 a.m.

The jurors were excused subject to call. [64]

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, December 1, 1941

[Title of Court and Cause.]

On this day came Mr. C. E. Cassidy, Public Prosecutor and Mr. W. Z. Fairbanks, Deputy Public Prosecutor, City and County of Honolulu, appearing for the prosecution and also came the defendant herein with Mr. J. G. Anthony, Special Assistant to the United States Attorney, and Mr. J. V. Esposito, his counsel. This case was called for sentence.

Upon the verdict of the jury heretofore entered in this case, that the defendant is guilty of manslaughter, the Court adjudged the defendant guilty of manslaughter and ordered that the defendant be confined in Oahu Penitentiary at hard labor for a period not to exceed ten years, minimum sentence to be later fixed in accordance with law.

Mr. Cassidy advised the Court that the defendant had not been asked whether he had anything to say why sentence should not be imposed.

Counsel for the defendant stated that the defendant had nothing to say.

Mr. Esposito and Mr. Anthony entered exceptions to the judgment of the Court and gave notice of appeal.

The Court stated that the matter of bond on appeal would be taken up by agreement of counsel.

The defendant was released in custody of counsel.

Later came Mr. Cassidy and Mr. Esposito with the bondsman herein, Mr. Wm. N. Rosehill.

Mr. Angus M. Taylor, Jr., United States Attorney, was present and was questioned by the Court.

Mr. Rosehill acquiesced in the continuance of the bond and resumed all responsibility and consented to the stay of mittimus. [65]

Mittimus was stayed to Friday, December 5, 1941.

The Judgment of the Court in this case reads as follows:

“JUDGMENT AND COMMITMENT

“On this the 1st day of December, A. D. 1941, came the Public Prosecutor of the City and County of Honolulu, and the above named defendant John Kong Yeung, appearing in person and by his counsel, J. Garner Anthony, Esq., and J. V. Esposito, Esq., and

“The defendant having been heretofore, on, to-wit, the 28th day of November, 1941, convicted upon a verdict rendered by the jury empaneled in this cause of the offense of Manslaughter (Section 5996, Revised Laws of Hawaii, 1935), and included offense in the Indictment returned herein, and the Defendant having been asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

“Ordered and adjudged that the Defendant having been found guilty of Manslaughter is hereby adjudged guilty of such offense and committed to imprisonment at hard labor in Oahu Penitentiary for a period not to exceed ten (10) years, minimum sentence to be later fixed in accordance with law.

“It Is Further Ordered that Mittimus herein be stayed until two (2) o’clock P. M. on Friday, the 5th day of December, 1941.

“It is further ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) INGRAM M. STAINBACK,
Judge,

United States District Court
for the Territory of Hawaii.”

[66]

From the Minutes of the United States District
Court for the Territory of Hawaii

Friday, December 5, 1941

[Title of Court and Cause.]

On this day came Mr. Charles E. Cassidy, Public Prosecutor, City and County of Honolulu, appearing for the prosecution and also came the defendant with Mr. J. G. Anthony, Special Assistant United

States Attorney, and Mr. J. V. Esposito, his counsel.

This case was called for hearing on a motion to set bond on appeal.

The Court ordered that this case be continued to Monday, December 8, 1941 at 2 p.m. for hearing on the motion to set bond. [67]

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, December 8, 1941

[Title of Court and Cause.]

On this day came Mr. W. Z. Fairbanks, Deputy Public Prosecutor, City and County of Honolulu, appearing on behalf of the prosecution, and also came the defendant with Mr. J. G. Antholmy, Assistant United States Attorney, his counsel. This case was called for hearing on a motion to set bond on appeal.

The Court denied the defendant's bond on appeal. The defendant was ordered committed.

Mr. Anthony entered an exception to the Court's ruling.

Mr. Anthony advised the Court that this defendant does elect to commence sentence and proceed with his appeal. [68]

From the Minutes of the United States District
Court for the Territory of Hawaii

Saturday, January 3, 1942

[Title of Court and Cause.]

ORDER FIXING TIME FOR SETTling
BILL OF EXCEPTIONS

“Pursuant to Rule IX, Criminal Rules, it is hereby ordered that the time for the settlement of appellant’s Bill of Exceptions is hereby extended until February 3rd, 1942.

“Dated: Honolulu, Hawaii, January 3rd, 1942.

(Signed) INGRAM M. STAINBACK

United States District Judge.”

[69]

From the Minutes of the United States District
Court for the Territory of Hawaii

Friday, January 30, 1942

[Title of Court and Cause.]

ORDER FIXING TIME FOR SETTling
BILL OF EXCEPTIONS

“Pursuant to Rule IX, Criminal Rules, it is hereby ordered that the time for settlement of appellant’s Bill of Exceptions is hereby extended until March 3, 1942.

“Dated: Honolulu, T. H., January 30th, 1942.

(Signed) INGRAM M. STAINBACK

United States District Judge.”

Consented to:

(s) CHAS. E. CASSIDY

Pub. Pros. C & C of Hon. [70]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant:

JOHN KONG YEUNG

Leonard Hotel

Honolulu, Hawaii

Names and Addresses of Appellant's Attorneys:

JOSEPH V. ESPOSITO

306 McCandless Bldg.

Honolulu, Hawaii

GARNER ANTHONY

312 Castle & Cooke Bldg.

Honolulu, Hawaii

Offense: Violation of Section 5996, Revised Laws of Hawaii 1935.

Date of Judgment: December 1, 1941.

Brief Description of Judgment or Sentence: Defendant was indicted for the crime of murder in the second degree (Revised Laws of Hawaii 1935, Secs. 5990, 5992), and on November 28, 1941, was

convicted by a jury empaneled in the above cause of the offense of manslaughter (Sec. 5996, Revised Laws of Hawaii 1935), an included offense in the indictment, and sentenced to imprisonment at hard labor in Oahu Penitentiary for a period not to exceed ten (10) years, minimum sentence to be later fixed in accordance with law. The [72] mittimus was stayed until 2:00 P.M. Friday, December 5, 1941, and defendant released in the custody of counsel, his bond being continued in full force and effect with the consent of the surety thereon.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned, on the grounds set forth below.

(s) JOHN KONG YEUNG

Appellant

Dated: Honolulu, Hawaii, December 5, 1941.

Grounds of Appeal:

1. That the verdict and judgment are not sustained by substantial evidence;
2. That the verdict and judgment are contrary to law;
3. Error in denying defendant's motion to quash the venire of jurors summoned to try the above cause;
4. Error in refusing to grant defendant's motion for a change of venue;
5. Error in the admission and exclusion of evi-

dence, which errors will be specified in the bill of exceptions, and include, among others: The admission of Plaintiff's Exhibits B-1, 2 and 3, H-1 to H-6 inclusive, I, J-1, 2 and 3;

6. Error in commenting on the evidence while the trial was in progress, which errors will be specified in the bill of exceptions, and, among others, prejudicial comment on the testimony of July Ah Kim Yam;

7. Error in permitting counsel for the prosecution to compel defendant to demonstrate with the lethal weapon (Plaintiff's Exhibit E) before the jury, the act of firing at target practice; [73]

8. Error in failing to charge the jury that under the indictment the jury could return a verdict finding defendant guilty of assault and battery;

9. Error in the charge to the jury giving prosecution's requested instructions Nos. 3, 4, 7-B, 7-F, and 11, and in failing to give defendant's instruction No. 1;

10. Error in refusing to correct a misstatement of the evidence made by the prosecutor, Chas. E. Cassidy, in argument to the jury, to the effect that defendant had testified he was in a coma immediately after he was first struck by the deceased;

11. Error in rebuking counsel for defendant, J. V. Esposito, and ordering him to sit down while making an objection to a misstatement of the evidence by the prosecutor Cassidy in his argument to the jury, and in finding defendant's counsel

guilty of contempt of court in the presence of the jury;

12. The court erred in failing to grant defendant's motions for mistrials made during the course of the trial, which motions will be specified in the bill of exceptions.

Dated: Honolulu, Hawaii, December 5, 1941.

(s) **JOHN KONG YEUNG**

Defendant-Appellant

Receipt of a copy of the foregoing notice of appeal is hereby acknowledged this 5th day of December, 1941.

(s) **CHAS. E. CASSIDY**

Prosecutor, City and County of Honolulu

[Endorsed]: Filed Dec. 5, 1941. [74]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now John Kong Yeung, the above named Defendant in the above entitled action, and says that in the indictment, trial, record, proceedings, verdict, judgment and commitment, rulings and orders, all in the United States District Court for the Territory of Hawaii in a criminal action lately pending in said United States District Court for the Territory of Hawaii, wherein the Territory of

Hawaii was and is Plaintiff and John K. Yeung was and is Defendant, there was manifest, material and prejudicial error, wherefore Defendant herein now makes, files and presents the following assignment of errors, to wit,

Assignment of Error No. I.

The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the Defendant.

Assignment of Error No. II.

The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the subject matter of the action.

Assignment of Error No. III.

The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this action for the reason that it is based upon an indictment returned by the Grand Jury of the First [76] Judicial Circuit, Territory of Hawaii and the said Court was without jurisdiction to try said indictment.

Assignment of Error No. IV.

The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over

this cause for the reason that it was not removable to said Court from the Circuit Court of the First Judicial Circuit, Territory of Hawaii, which is a Territorial court, under any rules or statutes of the United States made and provided therefor.

Assignment of Error No. V.

The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it involves an offense under the laws of the Territory of Hawaii which is not cognizable by the said Court.

Assignment of Error No. VI.

The United States District Court for the Territory of Hawaii was without jurisdiction to try the offense of murder in the second degree or any included offense under the laws of the Territory of Hawaii as set forth in the indictment herein.

Assignment of Error No. VII.

The United States District Court for the Territory of Hawaii is not a constitutional court of the United States and therefore there was no **right of** removal from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to said Court.

Assignment of Error No. VIII.

The United States District Court for the Territory of Hawaii was without jurisdiction to enter a judgment and commitment in this cause.

Assignment of Error No. IX:

The United States District Court for the Territory of Hawaii had no original jurisdiction over this cause and the said cause was therefore not removable to said Court. [77]

Wherefore said Defendant prays that the Judgment and Commitment of the said United States District Court for the Territory of Hawaii in said action heretofore entered against him on December 5, 1941 be reversed and set aside and that the case be remanded to said United States District Court for the Territory of Hawaii with instructions to return the same to the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Dated, Honolulu, T. H. February 26, 1942.

JOHN KONG YEUNG

Defendant

By CASS & SILVER

Attorneys

By PHILIP SILVER

Service of the foregoing Assignment of Errors is hereby admitted this 26th day of February, 1942.

THE TERRITORY OF HAWAII

Plaintiff

By CHAS. E. CASSIDY

Public Prosecutor, City and
County of Honolulu, Territory
of Hawaii.

[Endorsed]: Filed Feb. 26, 1942. [78]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court
for the Territory of Hawaii:

Pursuant to the appeal in the above entitled cause, you are hereby requested to transmit to the Ninth Circuit Court of Appeals the record in the above entitled cause, including the documents hereinafter referred to:

1. Clerk's minutes, First Judicial Circuit, Territory of Hawaii.
2. Bond.
3. Indictment of the Territorial Grand Jury.
4. Petition for Removal of Cause.
5. Order for Removal and Order of Writ of Habeas Corpus Cum Causa.
6. Writ of Habeas Corpus Cum Causa.
7. Motion to Quash.
8. Amended Petition for Removal of Cause.
9. Verdict.
10. Judgment and Commitment.
11. General Order of the United States District Court for the Territory of Hawaii dated December 12, 1941.
12. General Order of the United States District Court for the Territory of Hawaii dated February 10, 1942.

13. Appearance of Counsel.
14. Clerk's minutes, United States District Court for the Territory of Hawaii.
15. Designation of Record on Appeal.
16. Assignment of Errors. [80]
17. Order to Clerk.

Dated, Honolulu, T. H. February 26, 1942.

JOHN KONG YEUNG,
Defendant

By CASS & SILVER,
Attorneys

By PHILIP SILVER

Copy received February 26, 1942.

CHAS. E. CASSIDY

Pub. Pro. C & C of Hon.

[Endorsed]: Filed Feb. 26, 1942. [81]

[Title of District Court and Cause.]

ORDER

The above named Defendant having filed his "Assignment of Errors", pursuant to Rule 8 of the "Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilt," and his "Designation of Record on Appeal" herein, the Chief Clerk of this Court is hereby ordered to forward promptly, with his certificate, to the Ninth

Circuit Court of Appeals the above mentioned record and Assignment of Errors.

Dated, Honolulu, T. H. February 27, 1942.

INGRAM M. STAINBACK

Judge of the above entitled
Court.

Approved to form.

CHAS. E. CASSIDY

Pub. Pro. C & C of Hon.

[Endorsed]: Filed Mar. 2, 1942. [83]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON APPEAL

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 83 inclusive are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are \$10.95 and that said amount has been paid to me by the appellants.

In testimony whereof, I have hereto set my hand and affixed the seal of said court this 9th day of March, A. D. 1942.

(Seal)

WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
Territory of Hawaii. [84]

[Endorsed]: No. 10065. United States Circuit Court of Appeals for the Ninth Circuit. John Kong Yeung, Appellant, vs. Territory of Hawaii, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed March 14, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10065

TERRITORY OF HAWAII,

Appellee,

vs.

JOHN KONG YEUNG,

Appellant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON THIS
APPEAL AND DESIGNATION OF PARTS
OF RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF

Comes now John Kong Yeung, the above named Appellant, by his counsel, Cass & Silver, and respectfully states that on his appeal in this Court he will rely on the point that the United States District Court for the Territory of Hawaii was wholly without jurisdiction to try the indictment herein; that the "Assignment of Errors" is directed exclusively to this point; and that the following parts of the record are necessary for the consideration thereof.

1. Clerk's minutes of the Circuit Court, First Judicial Circuit, Territory of Hawaii.

2. Indictment for Murder in the Second Degree.

3. Petition for Removal of Cause.

4. Order for Removal and Order of Writ of Habeas Corpus Cum Causa.

5. Writ of Habeas Corpus Cum Causa.

6. Motion to Quash.

7. Amended Petition for Removal of Cause, Exhibit I, Exhibit II.

8. Verdict.

9. Judgment and Commitment.

10. Notice of Appeal.

11. Order of the United States District Court for the Territory of Hawaii dated December 12, 1941.

12. Order of the United States District Court for the Territory of Hawaii dated February 10, 1942.

13. Appearance of Counsel.

14. Clerk's Minutes.

15. Designation of Record on Appeal.

16. Assignment of Errors.

17. Order.

Dated, Honolulu, T. H. March 9, 1942.

JOHN KONG YEUNG,
Appellant

By CASS & SILVER,
Attorneys

By PHILIP SILVER

Receipt of a copy of the within "Statement of Points on Which Appellant Intends to Rely on this Appeal and Designation of Parts of Record Nec-

sary for the Consideration Thereof'' is hereby acknowledged this 9th day of March, 1942.

CHAS. E. CASSIDY

Public Prosecutor, City and
County of Honolulu.

[Endorsed]: Filed Mar. 14, 1942. Paul P.
O'Brien, Clerk.

13
No. 10,065

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN KONG YEUNG,

Appellant,

VS.

TERRITORY OF HAWAII,

Appellee.

OPENING BRIEF OF JOHN KONG YEUNG.

PHILIP SILVER,

Honolulu, T. H.,

Counsel for Appellant,

John Kong Yeung.

CASS & SILVER,

101-103 Rice Building, 227 S. King Street, Honolulu, T. H.,

Of Counsel.

FILED

MAY - 9 1942

PAUL P. O'BRIEN,
CLERK

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No. 10,065

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN KONG YEUNG,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

OPENING BRIEF OF JOHN KONG YEUNG.

JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION.

This is an appeal from a Judgment of the United States District Court for the Territory of Hawaii in a criminal action based upon an indictment for murder in the second degree in violation of Sec. 5990, Revised Laws of Hawaii, 1935. The indictment was returned by the Grand Jury of the First Judicial Circuit, Territory of Hawaii on October 2, 1941 and may be found on pages 6-7 of the Record.

The Indictment was returned by the said Grand Jury under the authority of Sec. 5490, Revised Laws of Hawaii, 1935. It was originally reported to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, which has jurisdiction of violations

of the criminal statutes of the Territory of Hawaii under Sec. 3643, Revised Laws of Hawaii, 1935.

On October 10, 1941 the Appellant filed a "Petition for Removal of Cause" (Record pp. 8-16) purportedly pursuant to 28 U.S.C.A. Sec. 76 at page 552. After subsequent proceedings, including the filing of an "Amended Petition for Removal of Cause" (Record pp. 24-48) the Public Prosecutor representing the Appellee "consented to the trial of this case" in the United States District Court for the Territory of Hawaii (Record p. 55). The Indictment was thereupon tried before a jury in the latter court purportedly under the authority of 28 U.S.C.A. Sec. 76 at page 552. A "Judgment and Commitment" was entered on the verdict of the jury finding the Appellant guilty of manslaughter, an offense included within that set forth in the Indictment (Record pp. 48-50).

The jurisdiction of this Court to review the said Judgment is based upon 28 U.S.C.A. 225 (a) Second at page 103 of 1941 Cumulative Annual Pocket Part which reads:

"Appellate jurisdiction.

(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions——

* * * * *

Second. In the United States District Courts for Hawaii and for Puerto Rico, in all cases."

The foregoing statute superseded 48 U.S.C.A. 645, Sec. 86, paragraph (d) of the Hawaii Organic Act,

which originally likewise allowed appeals from the District Court for the Territory of Hawaii to this Court in the same manner as appeals were then allowed from circuit courts to circuits courts of appeals. This Court thus has jurisdiction to review the Judgment of the United States District Court for the Territory of Hawaii for the purpose of ascertaining whether or not that court had jurisdiction to try the Indictment.

On March 17, 1941 the Supreme Court of the United States entered an order expressly extending the operation of the "Rules of criminal procedure after plea of guilty, verdict or finding of guilt" to appeals from the United States District Court for the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit in any case in which a verdict is rendered on and after July 1, 1941 (see note to Rule 13, 16 U.S.C.A. p. 150 of 1941 Cumulative Annual Pocket Part). These rules are set out at 18 U.S.C.A. Sec. 688 at page 131 of the 1941 Cumulative Annual Pocket Part). The present appeal was taken pursuant to Rule 8 of the said "Rules" being an appeal without bill of exceptions prosecuted upon the record of proceedings of the clerk of the United States District Court for the Territory of Hawaii. The Assignment of Errors (Record pp. 72-75) consists of nine errors, each and every one of which goes to the question of the jurisdiction of the lower court to try this indictment. The "Judgment and Commitment" was entered on December 1, 1941 (Record pp. 49-50). "Notice of Appeal" was filed

on December 5, 1941 pursuant to Rule 3. On December 12, 1941, the United States District Court for the Territory of Hawaii entered a general order continuing all matters and causes then pending before the court indefinitely (Record p. 50). That order was cancelled on February 10, 1942 (Record p. 52). The Assignment of Errors was filed with the clerk of the lower court by Appellant on February 26, 1942. On February 27, 1942 the lower court entered an Order directing the Chief Clerk thereof to forward promptly to this Court the record in the cause (Record pp. 77-78). The record was so forwarded and was docketed in this Court on March 14, 1942 as No. 10,065. The appeal has thus been perfected under Rule 8.

STATEMENT OF THE CASE.

This is an appeal from a judgment in a criminal case rendered by the United States District Court for the Territory of Hawaii. The defendant was indicted for the crime of murder in the second degree by the Grand Jury of the First Judicial Circuit for the Territory of Hawaii on October 2, 1941. Proceedings were taken by the Appellant to remove the cause for trial to the United States District Court for the Territory of Hawaii under the purported authority of 28 U.S.C.A. Sec. 76 at page 552.

After the filing of an "Amended Petition for Removal of Cause" the Public Prosecutor representing the Appellee consented to the removal of the cause

to the United States District Court for the Territory of Hawaii (Record p. 55). The latter court thereupon assumed jurisdiction of the indictment and the case was tried before a jury in that court, the trial resulting in a verdict of guilty of manslaughter. Whereupon a judgment and commitment were entered by the terms of which the Defendant was adjudged guilty of the offense of manslaughter, included within the offense set forth in the indictment, and was committed to imprisonment at hard labor in the Oahu Penitentiary for a maximum of ten years.

The case is now before this Court on an appeal taken under Rule 8 of the "Rules of Criminal procedure after plea of guilty, verdict or finding of guilt". It is thus an appeal without bill of exceptions prosecuted upon the clerk's records of proceedings.

The sole question involved in this appeal is whether or not the United States District Court for the Territory of Hawaii had jurisdiction to try this indictment. This question is raised by each and every one of the errors appearing in the "Assignment of Errors" (Record pp. 72-75). It appears from the record that this is the first time that the question of jurisdiction of the lower court has been raised in this case. In other words, the record reveals that at no time during the course of the proceedings in the court below was the question of jurisdiction presented to the Judge of the United States District Court for the Territory of Hawaii either for consideration or decision.

SPECIFICATION OF ERRORS RELIED UPON.

The following assigned errors are to be relied upon:

“ASSIGNMENT OF ERROR No. I (Record p. 73).
The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the Defendant.

ASSIGNMENT OF ERROR No. II (Record p. 73).
The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the subject matter of the action.

ASSIGNMENT OF ERROR No. III (Record p. 73).
The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this action for the reason that it is based upon an indictment returned by the Grand Jury of the First Judicial Circuit, Territory of Hawaii and the said Court was without jurisdiction to try said indictment.

ASSIGNMENT OF ERROR No. IV (Record pp. 73-74). The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it was not removable to said Court from the Circuit Court of the First Judicial Circuit, Territory of Hawaii, which is a Territorial court, under any rules or statutes of the United States made and provided therefor.

ASSIGNMENT OF ERROR No. V (Record p. 74).
The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it involves an offense under the laws of the Territory of Hawaii which is not cognizable by the said Court.

ASSIGNMENT OF ERROR No. VI (Record p. 74).
The United States District Court for the Territory of Hawaii was without jurisdiction to try the offense of murder in the second degree or any included offense under the laws of the Territory of Hawaii as set forth in the indictment herein.

ASSIGNMENT OF ERROR No. VII (Record p. 74).
The United States District Court for the Territory of Hawaii is not a constitutional court of the United States and therefore there was no right of removal from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to said Court.

ASSIGNMENT OF ERROR No. VIII (Record p. 74).
The United States District Court for the Territory of Hawaii was without jurisdiction to enter a judgment and commitment in this cause.

ASSIGNMENT OF ERROR No. IX (Record p. 75).
The United States District Court for the Territory of Hawaii had no original jurisdiction over this cause and the said case was therefore not removable to said Court."

ARGUMENT.**POINT 1.**

THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII HAD NO ORIGINAL JURISDICTION TO TRY THIS INDICTMENT FOR THE CRIME OF MURDER IN THE SECOND DEGREE, BEING A VIOLATION OF SEC. 5990, REVISED LAWS OF HAWAII, 1935.

Assignment of Error No. I.

“The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the Defendant.”

Assignment of Error No. II.

“The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the subject matter of the action.”

Assignment of Error No. III.

“The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this action for the reason that it is based upon an indictment returned by the Grand Jury of the First Judicial Circuit, Territory of Hawaii and the said Court was without jurisdiction to try said indictment.”

Assignment of Error No. IV.

“The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it was not removable to said Court from the Circuit Court of the First Judicial Circuit, Territory of Hawaii,

which is a Territorial court, under any rules or statutes of the United States made and provided therefor.”

Assignment of Error No. VI.

“The United States District Court for the Territory of Hawaii was without jurisdiction to try the offense of murder in the second degree or any included offense under the laws of the Territory of Hawaii as set forth in the indictment herein.”

The Appellant was indicted by the Grand Jury of the First Judicial Circuit, Territory of Hawaii, for the crime of murder in the second degree in violation of Sec. 5990, Revised Laws of Hawaii, 1935. This is an offense of which the United States District Court for the Territory of Hawaii (hereinafter referred to as District Court) has no power to take cognizance. The jurisdiction of the District Court is set out in 48 U.S.C.A. Sec. 642, at page 201. Its criminal jurisdiction is limited to the criminal jurisdiction of “District Courts of the United States”. Such jurisdiction is set out in 28 U.S.C.A. Sec. 41 (2) at page 32 and 18 U.S.C.A. Sec. 546 at page 8. Violation of Sec. 5990, Revised Laws of Hawaii, 1935 is clearly not a crime or offense “cognizable under the authority of the United States” being purely and simply a violation of a law enacted by the legislature of the Territory of Hawaii. The Grand Jury empaneled by the United States District Court for the Territory of Hawaii could not have returned a verdict for violation of Sec. 5990, Revised Laws of

Hawaii, 1935 under any existing statute, rule of law or authority. Had it returned the indictment the District Court would have been obliged to dismiss it immediately for lack of jurisdiction.

As will be subsequently pointed out there is a basic and vital distinction between causes over which federal and state courts have concurrent jurisdiction and causes over which state courts alone have jurisdiction but which may be removed to the federal courts under the authority of a statute expressly authorizing such procedure. The present indictment clearly falls within the latter category. The District Court had no original jurisdiction over the Defendant or the offense charged. If there was any right in any one to remove the cause from the Circuit Court of the First Judicial Circuit to the District Court and if the District Court had the power and authority to try the indictment after such removal, clear and express statutory authorization therefor must be found to exist somewhere.

POINT 2.

THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII HAD NO JURISDICTION TO TRY THIS INDICTMENT FOR THE CRIME OF MURDER IN THE SECOND DEGREE BEING A VIOLATION OF SEC. 5990, REVISED LAWS OF HAWAII, 1935, ON REMOVAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

“Assignment of Error No. V.

“The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it involves

an offense under the laws of the Territory of Hawaii which is not cognizable by the said Court.”

Assignment of Error No. VII.

“The United States District Court for the Territory of Hawaii is not a constitutional court of the United States and therefore there was no right of removal from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to said Court.”

Assignment of Error No. VIII.

“The United States District Court for the Territory of Hawaii was without jurisdiction to enter a judgment and commitment in this cause.”

Assignment of Error No. IX.

“The United States District Court for the Territory of Hawaii had no original jurisdiction over this cause and the said case was therefore not removable to said Court.”

The cause was purportedly removed from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to the District Court under the authority of 28 U.S.C.A. Sec. 76 at page 552 which reads in part as follows:

“S 76. (Judicial Code, section 33, amended.) Same; suits and prosecutions against revenue officers. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority

of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: * * *

An excellent discussion of the historical function and purpose of the statute may be found in the case of *Tenn. v. Davis*, 100 U.S. 257, 25 L. Ed. 648. In that case Mr. Justice Strong pointed out that this removal statute, a restriction upon state sovereignty, is valid and constitutional and in fact essential to the very existence of the Federal Government.

“* * * If, when thus acting, and within the scope of their authority, those officers can be arrested, and brought to trial in a State Court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once for their protection; if their protection must be left to the action of the State Court; the operations of the General Government may at any time be arrested at the will of one

of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested.”

Tenn. v. Davis, 100 U.S. 257, 263, 25 L. Ed. 648, 650.

There is simply no logic or reasoning by which the word “State” as used in the statute can be twisted or distorted to include “Territory.” And Mr. Justice Strong’s opinion makes it abundantly clear that there is no historical reason or justification for any such distortion. The statute was never intended to authorize or effectuate removals from one court appointed by and under control of the President and Congress of the United States as are the Circuit Courts of the Territory of Hawaii to another court appointed and controlled in exactly the same fashion. The Circuit Courts of the Territory of Hawaii were created and are controlled by Congress (48 U.S.C.A. Sec. 631 at p. 197).

This statute is more than merely a procedural statute. Such removal statutes as 28 U.S.C.A. Sec. 71

at page 3 are purely procedural statutes because the causes therein described as removable from state courts to federal courts are causes over which both sets of courts had original jurisdiction. In other words, that statute merely gives the Defendant the right to remove the cause to a Court in which it might have been instituted in the first place with complete propriety. That is not at all true with reference to the present statute, which covers causes over which the Federal courts have no original jurisdiction but in which they are able to act solely by reason of the existence of the removal statute. Since the statute thus confers jurisdiction where none previously existed it is doubly important that its terms be carefully scrutinized and that it be not so construed as to stretch the jurisdiction created.

The very question we are now considering was submitted to the Attorney General of the United States by the Department of Justice on August 9, 1871. A lucid and unanswerable opinion was rendered on August 28 of the same year. 13 Opinions of the Attorney General 584. It is interesting to note that the reasoning of the Attorney General revolves largely around the proposition that to so construe the statute as to entitle a litigant to transfer a cause from one court "created by the United States laws, presided over by a judge appointed by the President of the United States, and all the proceedings in which are regulated by the acts of Congress establishing a territory" to another court identically so constituted would rob the statute of any bene-

ficial or desirable effect and would in fact defeat its purpose.

From the earliest times the Supreme Court of the United States has held that where the word "State" is used in a statute it will not be construed to include "Territory" unless some special or pressing reason exists therefor.

U. S. v. Wynne, 217 U.S. 244, 54 L. Ed. 748;
New Orleans v. Winter, 1 Wheat. 91, 4 L. Ed. 44;

Mansfield etc. R. Co. v. Swan, 111 U.S. 379,
 4 S.Ct. 510, 28 L. Ed. 462;

Cameron v. Hodges, 127 U.S. 322, 8 S.Ct. 1154,
 32 L. Ed. 132;

Southern Kansas R. Co. v. Briscoe, 144 U.S.
 133, 12 S. Ct. 538, 36 L. Ed. 377.

We thus have no hesitation in asserting flatly that so far as 28 U.S.C.A. Sec. 76 goes, it contains no basis or authority in logic or history for the removal of a cause from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to the United States District Court for the Territory of Hawaii.

We anticipate that the Appellee will take the position that 48 U.S.C.A. Sec. 645 at page 203 creates a right and power of removal from one territorial court to another because the phrase "removal of causes" appears therein. It reads in full:

"S 645. Writs of error and appeal. Writs of error and appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same

manner as writs of error and appeals are allowed from district courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

We regret the necessity of burdening this brief with an anticipatory argument but we feel we are justified in so doing in this case because the only shadow of a basis for defending the District Court's jurisdiction is to be found in this statute.

"7. In General.—In dealing with statutes intended to affect or claimed to affect the continuance of jurisdiction in courts of original and general authority the law has always recognized a principle of construction which served to favor the retention of jurisdiction. * * * And in the United States, the authorities are very numerous and striking that before it can be claimed that an act is to have the effect of absolutely divesting a jurisdiction which has regularly and fully vested, the law in favor of it must be clear and unambiguous. * * * There is abundant reason to favor the application of this principle to removal acts of Congress, * * *"

23 *R. C. L.* 605.

In addition to the foregoing rule of construction there are a number of conclusive reasons why 48

U.S.C.A. Sec. 645 does not authorize removal from one territorial court to another as follows:

(1) 48 U.S.C.A. 645 HAS BEEN REPEALED BY IMPLICATION.

Between 1900 when the statute was first enacted and 1911, the only statutory basis for an appeal from the Supreme Court of the Territory of Hawaii to the Mainland United States Courts was to be found in this section of the Hawaii Organic Act. The Supreme Court of the United States held in a number of well considered cases that appeals and writs of errors were thereby provided to and from the United States Supreme Court in exactly the same manner as were provided by other statutes to and from the highest courts in the several states and were likewise limited in scope to federal questions.

Ex Parte Wilder's Steamship Company, 183 U.S. 545, 46 L. Ed. 321;

Equitable Life Assurance Soc. of U.S. v. Brown, 187 U.S. 308, 47 L. Ed. 190.

By amendment (act of March 3, 1905, Chap. 1465, Sec. 3; 33 Stat. at L. 1035) the appellate jurisdiction of the United States Supreme Court was enlarged to include "all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."

Harrison v. Magoon, 205 U.S. 501, 51 L. Ed. 900;

Notley v. Brown, 208 U.S. 429, 52 L. Ed. 559;

Bierce v. Waterhouse, 219 U.S. 320, 55 L. Ed. 237;

Spreckels v. Brown, 212 U.S. 208, 53 L. Ed. 476;

Honolulu Rapid Transit Co. v. Wilder, 211 U.S. 144, 53 L. Ed. 124.

Then in 1911 by Sec. 246 of the Judicial Code of March 3, 1911, Chap. 231, 36 Stat. at L. 1087 it was provided that writs of error and appeals from the final judgments and decrees of the Supreme Court of Hawaii may be taken to the Supreme Court of the United States.

“in the same manner, under the same regulations, and in the same classes of cases, in which” they may be taken from the final judgments and decrees of the court of a state, “and also in all cases wherein the amount involved, exclusive of costs, * * * exceeds the sum or value of five thousand dollars.”

This statute completely superseded 48 U.S.C.A. 645 so far as writs of error and appeals from the Supreme Court of the Territory of Hawaii were concerned.

Hapai v. Brown, 239 U.S. 502, 60 L. Ed. 407.

In 1915 the statute was further amended and for the first time appeals were allowed from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit (Act of Jan. 28, 1915, 38 Stat. at L. 803, Chap. 22).

Inter-Island Steam Navigation Co. v. Ward, 242 U.S. 1, 61 L. Ed. 113.

Finally in 1925 exclusive appellate jurisdiction over judgments and decrees of the Supreme Court of the Territory of Hawaii was vested in the Circuit Courts

of Appeals by 28 U.S.C.A. 225 at page 294 which reads in part as follows:

“(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions * * *”

* * * * *

“Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all civil cases wherein the value in controversy, exclusive of interest and costs, exceeds \$5,000, and in all habeas corpus proceedings.”

What then has happened to 48 U.S.C.A. 645? The first sentence thereof is covered by paragraph “Second” of 28 U.S.C.A. 225. And the second sentence as construed by the United States Supreme Court in the cases above cited has been completely eradicated by the procedure established by 28 U.S.C.A. 225. The two statutes cannot stand together since the earlier creates a right of appeal directly to the United States Supreme Court and the latter creates a right of appeal to this Court exclusively. Can there be any doubt that the right of appeal from the Supreme Court of the Territory of Hawaii to the United States Supreme Court no longer exists? That being so, there is nothing left of the second sentence of 48 U.S.C.A. 645. Sec. 246 of the Judicial Code has of course been repealed, leaving nothing of the old procedure. 28 U.S.C.A. 225 has taken its place completely. A careful recodification, taking into consideration repeals

by implication, would require the complete removal of 48 U.S.C.A. 645 and particularly the second sentence thereof from the statute books.

Assuming that which we expressly deny, to wit, that 48 U.S.C.A. 645 is in effect and still on the books, it clearly did not confer jurisdiction on the District Court in the present case for the following additional reasons.

- (2) THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII IS NOT ONE OF THE "COURTS OF THE UNITED STATES".

This question was squarely raised and settled in the case of *United States v. Mookini*, 303 U.S. 201, 82 L. Ed. 746. In that case it was held that notwithstanding that the United States District Court for the Territory of Hawaii has been vested with jurisdiction similar to that of the "District Courts of the United States", that fact does not make it a "District Court of the United States". See also *United States v. Burroughs*, 289 U.S. 159, 163, 77 L. Ed. 1096, 1098; *O'Donoghue v. United States*, 289 U.S. 516, 77 L. Ed. 1356, 1363. It will be noted that the United States District Court for the Territory of Hawaii is referred to in the *Mookini* case and clearly designated as a "territorial court" or "legislative court" which is precisely what it is. It was created by an act of Congress just as the Circuit Courts and Supreme Court of the Territory of Hawaii were created by act of Congress. Its judges do not hold office for life but only for periods of six years. (48 U.S.C.A. Sec. 643 at page 202.) It is clearly thus not even a constitu-

tional court. We urge that the term "courts of the United States" as used in the statute was used in its "historic significance" to include only constitutional courts. Surely the use of the phrase twice in the second sentence of the statute permits of no other construction.

(3) 48 U.S.C.A. SEC. 645 IS BY ITS TITLE AND SUBJECT MATTER AN "APPEAL" STATUTE.

The statute was originally entitled "Writs of Error and Appeal". Writs of error were subsequently abolished so that its title at the present time is simply "Appeal". In one sense, the basic concept of an appeal is altogether different from the doctrine of removal of causes as between state courts and federal courts but in another sense an appeal is in the nature of a removal from one court to another. Surely writs of error and habeas corpus are removals in the general sense of the word. It is most unlikely that there was a legislative intent to confuse separate and distinct procedures and merge them in one statute. Such an intent clearly does not appear from the wording of the statute itself. Thus the conclusion is inescapable that "removal of causes" is used in the statute in its general sense of removal by appeal or writ.

(4) 48 U.S.C.A. 645 REGULATES THE APPELLATE RELATIONS BETWEEN THE "COURTS OF THE TERRITORY OF HAWAII" AND THE "COURTS OF THE UNITED STATES", NOT BETWEEN ONE COURT OF THE TERRITORY OF HAWAII AND ANOTHER.

"Courts of the United States" is used twice in the second sentence of the statute. The phrase obviously has the same meaning in both places as including the

Mainland federal courts, the United States Circuit Courts of Appeals and the Supreme Court of the United States. How else are we to construe the phrase "as between the courts of the United States and the courts of the several states". The phrase "as between the courts of the United States and the courts of the Territory of Hawaii" can mean nothing other than the relations between the Circuit Court of Appeals and the United States Supreme Court on the one hand and the Supreme Court of the Territory of Hawaii on the other.

Had Congress intended to create the right of removal from the Circuit Courts of the Territory of Hawaii to the United States District Court for the Territory of Hawaii it would undoubtedly have so clearly expressed itself by making the concluding phrase "as between the Courts of the Territory of Hawaii and the said District Court" as was done in the governing act of Porto Rico. But it was not regulating the relations between various Territorial courts. What it was doing was creating a procedure for appeal from the Supreme Court of Hawaii to the United States Supreme Court.

The Court's attention is respectfully invited to the significant distinction between the language of 48 U.S.C.A. 645 and the comparable section of the Foraker Act which is the act of Congress governing Porto Rico, to wit, 48 U.S.C.A. 864, at page 275. The concluding phrase of the first sentence in the latter statute "as between the district court of the United States and the courts of Porto Rico" shows a clear

intent to regulate the relations between the local Territorial courts and the District Court. No such language appears nor can any such intent be inferred from the wording of our statute.

In the case of *Garrozi v. Dastas*, 204 U.S. 64, 51 L. Ed. 369, it was held that even if an irregularity in the removal procedure is conceded to exist, nevertheless such irregularity is immaterial if the District Court had original jurisdiction of the parties and the subject matter of the action.

To the same effect see *Mackay v. Uinta Development Co.*, 229 U. S. 173, 57 L. Ed. 1138; *Arizona & N. M. Rwy. Co. v. Clark*, 235 U.S. 669, 59 L. Ed. 415.

From the Appellee's standpoint, the difficulty in the present case lies in the fact that the District Court had no original jurisdiction whatever over either the Appellant or the offense charged. Thus its lack of jurisdiction could not be cured by waiver, consent or any other action whatever on the part of the parties.

(5) THE PHRASE "REMOVAL OF CAUSES" IS USED THEREIN IN ITS GENERAL SENSE OF TRANSFER FROM ONE COURT TO ANOTHER BY APPEAL OR WRIT.

It is our contention that 48 U.S.C.A. Sec. 645 means nothing more or less than that the laws relating to appeals as between the state courts and the Mainland Federal Courts are applicable to appeals from the Supreme Court of the Territory of Hawaii to the Ninth Circuit Court of Appeals and the Supreme Court of the United States ("courts of the United States"). The phrase "removal of causes" as it ap-

pears therein is used in its general signification as removal from one court to another by means of writ of error or any other writ. It should be borne in mind that when the statute was first enacted writs of error were available. In a sense, a writ of error or an appeal, is a means of removing a cause from one court to another.

The phrase "removal of causes" has been variously used to signify change of venue.

Vickery v. Worford, 24 S.W. 764, 765, 119 Mo. 275;

State v. Reid, 18 N. C. 577, 28 Am. Dec. 572,

and removal from one state court to another court

Phillips v. Phillips, 186 Ala. 545, 65 So. 49;

Felts v. Delaware L. & W. R. Co., 45 A. 493, 494, 195 Pa. 21.

It is clear that in this statute the phrase is used in its general sense. Black's Law Dictionary, Second Edition, defines "removal of causes" primarily as meaning "the transfer of a cause from one court to another". And that must have been precisely what Congress intended in saying "as between the courts of the United States and the courts of the Territory of Hawaii", all within the framework of the title and subject of the statute, "Appeal".

(6) 28 U.S.C.A. SEC. 76 IS A SUBSTANTIVE CRIMINAL STATUTE WHICH SHOULD NOT BE EXTENDED BY IMPLICATION.

As already mentioned 28 U.S.C.A. Sec. 76 is substantive in the sense that it confers criminal jurisdiction on Federal courts where none previously

existed. Such criminal jurisdiction should not be extended by implication, which would result if 48 U.S.C.A. Sec. 645 were so construed as to grant the right of removal from the Circuit Courts of the Territory of Hawaii to the United States District Court for the Territory of Hawaii.

Anticipating that the Appellee will point to 48 U.S.C.A. 645 as justifying the District Court's jurisdiction in the present case, we urge that assuming this statute is still in existence, it in no way alters or affects 28 U.S.C.A. 76 and certainly does not enlarge the criminal jurisdiction of our District Court but merely creates the framework of appeal to the "Courts of the United States", to wit, the Supreme Court of the United States, which has been altered by later statutes. If the Appellee does not rely on 48 U.S.C.A. 645, then there is not even the shadow of a basis for arguing that the lower court had jurisdiction to try the present indictment.

We are aware of no logical basis for construing this statute so as to authorize removal of criminal cases from the Circuit Courts of Hawaii to the District Court, both sets of courts controlled by the President and Congress of the United States. If any such exists, we must ask counsel for the Appellee to clearly state it in their Answering Brief herein. We must also ask counsel how 48 U.S.C.A. 645 can be reconciled with 28 U.S.C.A. 225 and how the two conflicting procedures contemplated therein can exist side by side.

We take it that the proposition that jurisdiction cannot be conferred upon a court by consent or stipulation of the parties is so well settled in our system of jurisprudence that nothing more is required than a bare reference to the authorities.

14 *Am. Jur.* 380 (large collection of Federal and State cases in footnote No. 13).

CONCLUSION.

The Appellant was tried before the United States District Court for the Territory of Hawaii under an indictment of which the said court had no power or jurisdiction to take cognizance. For the foregoing reasons all proceedings in the District Court should be set aside.

Honolulu, Territory of Hawaii,
May 1, 1942.

CASS & SILVER,

By PHILIP SILVER.

*Counsel for Appellant,
John Kong Yeung.*

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

JOHN KONG YEUNG,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

TERRITORY'S ANSWERING BRIEF

CHAS. E. CASSIDY,
*Public Prosecutor of the
City and County of Honolulu,
Attorney for Appellee.*

Filed this day of, 1942.

PAUL P. O'BRIEN, Clerk

By.....
Deputy Clerk.

FILED

JUL 6 1942

PAUL P. O'BRIEN,

CLERK

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IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

JOHN KONG YEUNG,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

TERRITORY'S ANSWERING BRIEF

STATEMENT OF QUESTIONS INVOLVED

A slight amplification of Appellant's statement of the case is offered to assist in designating the questions involved on this appeal.

John Kong Yeung, the Appellant, was charged with murder in the second degree in violation of Section 5990, Revised Laws of Hawaii 1935, in an indictment returned on October 2, 1941 by a grand jury impaneled for the First Judicial Circuit of the Territory of Hawaii. The Circuit Court for that Circuit assumed jurisdiction over the defendant and of the cause covered by the indictment (Rec. pp. 2-5). After arraignment but prior to entry of plea, the defendant filed a petition in the United States

District Court for the Territory of Hawaii praying for a removal of the cause against him to that court (Rec. pp. 3, 5 and 8). A Writ of Habeas Corpus Cum Causa was issued in response to the petition and the cause was ordered removed to the Federal District Court (Rec. p. 16). The Territory interposed a motion for a remand of the cause to the court of origin on the general grounds that the averments of the petition were too indefinite and insufficient to support a removal or a determination of whether the cause was one that might be removed (Rec. p. 21). Thereupon the defendant obtained leave to file and did file an amended petition which in substance alleged that when the defendant shot and killed the deceased on the occasion set forth in the indictment, he was on duty and acting as a United States customs guard. The amended petition further set forth with considerable particularity a version of the circumstances attending the killing and the defendant's contention that it was committed as an accident, in self defense, to consummate an arrest of the deceased and to prevent the commission of a felony by the latter, all of which were averred to have been necessary incidents to the performance of the defendant's duty as such customs guard (Rec. pp. 38-40). The petition was framed to meet the requirements of 28 U.S.C.A. Section 76. No further opposition was made to the removal after the amended petition was filed (Rec. p. 55). Issue was joined (Rec. p. 56) and the trial proceeded in the regular course to a verdict against and sentence of the defendant for manslaughter (Rec. pp. 48-50). Appellant seeks by this appeal to have that conviction set aside on the purported basis that the District

Court was without legal authority to accept jurisdiction of the cause presented by the Territorial indictment.

The jurisdiction of the Territorial Circuit Court is conceded by Appellant (Op. Br. pp. 1-2). The opening brief makes no suggestion that the capacity in which the amended petition alleges the defendant was acting at the time of the offense was not one within the purview of 28 U.S.C.A. 76, nor is any point raised that the allegations of the amended petition were in any other manner insufficient to meet the requirements of that statute so as not to have authorized the lower court to assume jurisdiction over the cause if the provisions of the cited statute were made applicable by Paragraph (d) of Section 86 of the Hawaiian Organic Act (48 U.S.C.A. 645). Hence Appellant's attack on the lower court's jurisdiction, read in light of the contentions urged in the opening brief against the background of the record, resolves this appeal to a consideration of the following:

First: Does Section 86 of the Hawaiian Organic Act make the laws of the United States regulating the removal of causes applicable between the Territorial trial courts and the United States District Court for the Territory of Hawaii? If so,

Second: Are the provisions of said Section 86 so extending the laws of the United States on the removal of causes to the Territory of Hawaii still in effect or have they been repealed by implication?

ARGUMENT

POINT 1.

SECTION 86 OF THE HAWAIIAN ORGANIC ACT MAKES THE LAWS OF THE UNITED STATES RELATING TO REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL DISTRICT COURTS APPLICABLE BETWEEN THE TERRITORIAL TRIAL COURTS AND THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII.

Section 86 of the Hawaiian Organic Act was originally enacted as a single paragraph (Chapter 339, 31 Stat. at L. 158). It read, with the conformity clause pertinent to the issue at hand italicized, as follows:

“Section 86. That there shall be established in said Territory a district court to consist of one judge, who shall reside therein and be called the district judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney, and a marshal of the United States for the said district, and said judge, attorney, and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as writs of error and appeals are allowed from district courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court.

The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of said court shall be held at Honolulu on the second Monday in April and October and at Hilo on the last Wednesday in January of each year; and special terms may be held at such times and places in said district as the said judge may deem expedient. The said district judge shall appoint a clerk for said court at a salary of three thousand dollars per annum, and shall appoint a reporter of said court at a salary of twelve hundred dollars per annum."

In presenting his case on the construction of the conformity clause, above emphasized, Appellant in substance contends that the Federal court created by Section 86 of the Organic Act is not a "court of the United States" and that the phrase "removal of causes" as therein used has reference only to appellate transfers so that the statute does not provide for the removal of causes from any Territorial trial court to the United States District Court for the Territory of Hawaii.

The construction offered by Appellant is completely vulnerable to precedent and reason.

(1)

SECTION 86 OF THE ORGANIC ACT HAS BEEN JUDICIALLY CONSTRUED TO AUTHORIZE THE REMOVAL OF CAUSES FROM THE TERRITORIAL TRIAL COURTS TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII.

Within less than six months after the effective date of the Hawaiian Organic Act the Supreme Court of the Territory had occasion in *Hind v. Wilder's Steamship Co.*, 13 Haw. 174, to consider and construe the above

referred to conformity clause of Section 86 of the Organic Act. After the Supreme Court had affirmed a decree in admiralty rendered prior to annexation in a circuit court of the Republic of Hawaii against the Steamship Company, the company moved to have bond fixed for an appeal to the Ninth Circuit Court of Appeals. It contended that Section 15 of the so-called Evarts Act (26 Stat. at L. 830, Chap. 517), controlled. That statute vested jurisdiction to review the decisions of the supreme courts of the Territories in the circuit courts of appeals. The Supreme Court held, however, that the general statute on appeals from territorial courts was inoperative in the case because the appellate procedure was specifically regulated by the provisions of Section 86, *supra*, which placed the courts of the Territory of Hawaii in the same relative position to the Federal judicial system as the state courts, and since no appeal could be taken from any state court to a circuit court of appeals, the Hawaiian Supreme Court declined to recognize or participate in perfecting the Steamship Company's attempted appeal. The company then made direct application to this Court which said, *inter alia*, in a comprehensive opinion denying the appeal, that:

"Congress found in the republic of Hawaii a system of courts already established, whose jurisdiction was complete, and from the highest tribunal of which there was no appeal. To that system congress, by the act, added a district court, conferring upon it the jurisdiction which pertains to the district and circuit courts of the United States, and providing for removing to that court from the territorial courts causes which under the removal acts were removable from a state court to a court of the United States . . ."

Wilder's S.S. Co. v. Hind, 108 F. 113 at 116.

The holding and basic reasoning of this Court and the Territorial Supreme Court were approved by the United States Supreme Court when it refused to grant a writ of mandamus to compel entertainment of the appeal (*In re Wilder Steamship Co.*, 183 U.S. 545, 46 L. Ed. 321).

The United States District Court for the Territory of Hawaii has likewise held that causes might be brought to it from the Territorial trial courts just as removals are allowed from State courts to Federal district courts in the continental United States.

“The laws relating to removal of causes were extended to the district of Hawaii by our Organic Act, Sec. 86 . . .”

Farm Corn v. Wardell, 4 U.S.D.C. Haw. 605.

It is thus seen that this Court, supported by highly respectable authority, has ruled adversely to Appellant's contention that the Organic Act does not provide for the removal of causes to the United States District Court for the Territory of Hawaii.

(2)

IN CREATING THE GOVERNMENT FOR THE TERRITORY OF HAWAII CONGRESS ESTABLISHED SEPARATE TERRITORIAL AND FEDERAL JUDICIAL SYSTEMS HAVING A RELATIONSHIP TO EACH OTHER CORRESPONDING TO THAT EXISTING BETWEEN THE STATE AND FEDERAL SYSTEMS.

The exact point in the Wilder's Steamship Company case pertained to the phrase in the conformity clause concerning writs of error and appeals and it is therefore true, as undoubtedly we shall be reminded in Appellant's reply brief, that the ruling of this Court deciding the issue at hand against his contention was dictum. However that may be, and aside from the question of what weight

should be accorded judicial dictum where the point incidentally ruled upon is so closely connected to the issue decided as it is in the Wilder's case, Appellee's counter proposal that Section 86 of the Organic Act provides for removals is but a corollary to the principal holding of the case.

The problem involves no question of legislative authority. It is merely one of statutory construction. Consequently, the inquiry is confined to ascertaining what Congress intended by the language it used in the clause under consideration.

"The question here, as in any problem of statutory construction, is the intention of the enacting body."

U.S. v. Rosenblum Truck Lines, — U.S. — 62 S. Ct. 445, 86 L. Ed. 387 at 389.

Lincoln v. Ricketts, 297 U.S. 373, 80 L. Ed. 724 at 727

Haw. v. Mankichi, 190 U.S. 197, 47 L. Ed. 1016 at 1021.

If the wording of the conformity clause be deemed ambiguous or if it is capable of being made so by the method of construction adopted in the opening brief, then we are at liberty to look to the general purpose and the historical background of the enactment containing the clause for assistance in determining its proper meaning.

"All statutes must be construed in the light of their purpose."

Haggar Co. v. Helvering, 308 U.S. 389, 84 L. Ed. 340 at 344.

"If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress."

Porto Rico Railway L. & P. Co. v. Mor, 253 U.S. 345, 64 L. Ed. 944 at 946.

“The act was the product of a period, and ‘courts, in construing a statute may with propriety recur to the history of the time when it was passed.’”

Great Northern R. Co. v. U.S., — U.S. — 62 S. Ct. 529, 86 L. Ed. 446 at 448

Helvering v. N.Y. Trust Co., 292 U.S. 455, 78 L. Ed. 1361 at 1366.

Much of the information required for the application of the foregoing rules of construction is within easy reach.

The portion of this Court’s opinion in the Wilder’s Steamship Company case quoted above (ante, p. 6) contemporaneously recorded that Congress found a mature judiciary prevailing in Hawaii when it undertook establishing a Territorial government for the Islands. That system was the product of considerably more than a half century’s development under organized constitutional government and it was comparable to the judicial systems then existing in the various states. (See *Carter v. Second Judge, First Circuit*, 16 Haw. 242 at 247 et seq.). In that respect the situation was entirely unlike that which had confronted Congress when it had assumed the task of providing organized governments for the various territories incorporated into the Union theretofore, so that instead of providing for the establishment of one court having jurisdiction over both local and federal matters as had been the usual rule in legislating for new territories, in the case of our Territory Congress kept the two jurisdictions completely separate. It perpetuated the existing courts and invested them with jurisdiction over local laws and cases and in addition created a United States District Court to take jurisdiction of Federal laws and cases, and it placed the latter court in the same relationship to the

Territorial courts as the Federal district and circuit courts were to state courts.

“It organized the courts and distributed their jurisdiction in this territory as it has done in no other territory—namely, on the lines of federal and state courts in the several States. . . . it created both classes of courts—one with the jurisdiction of District and Circuit Courts of the United States, the other corresponding to the courts of a State, and, having done so, it naturally placed the two classes of courts on the same footing as to appeals and other proceedings as the corresponding federal and State courts elsewhere, that is, in the several States.”

Hind v. Wilder's Steamship Co., *supra*, 13 Haw. 174 at 182.

“Upon consideration of the various provisions of the act providing a government for the territory of Hawaii, we are convinced that congress intended thereby to establish in that territory between the federal court created by the act and the system of territorial courts then existing, and substantially by the act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states.”

Wilder's S.S. Co. v. Hind, *supra*, 108 Fed. 113 at 114-115.

Also:

U.S. v. Bower, 4 U.S.D.C. Haw. 466

In the Matter of Atcherley, 3 U.S.D.C. Haw. 404 at 430

U.S. v. Moore, et al, 3 U.S.D.C. Haw. 66

Terr. v. Kaizo, 17 Haw. 295 at 297

In re Abreu, 27 Haw. 237 at 240

9 *Ann. Cas.* 394 at 395.

Since the general purpose of Congress was to place the Territorial courts in the same relationship to the Federal

judicial system in which the state courts stood, it logically follows that Congress intended that each and every incident of that relationship, including the removal of causes, should also pertain between the Territorial and Federal judicial systems. "Legislation aimed at a whole embraces all its part," *U.S. v. Darby*, 312 U.S. 122, 85 L. Ed. 609 at 622. The broad language of the statute, "*the laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states,*" could hardly have been made more inclusive to extend every feature involved in the relationship between State and Federal courts on the mainland to the Territorial and Federal courts in Hawaii.

The Appellant urges, however, that there can be no local application of the statute's provisions on the removal of causes because the United States District Court for the Territory is not one of the "courts of the United States" (Op. Br. p. 20). We believe sufficient answer to the proposition may readily be inferred from what has already been covered herein. Further analysis of and reply to the details of Appellant's argument will, however, afford a satisfactory means of checking the soundness and strength of Appellee's position.

(3)

THE DISTRICT COURT ESTABLISHED BY SECTION 86 OF THE HAWAIIAN ORGANIC ACT IS A "COURT OF THE UNITED STATES" WITHIN THE MEANING AND APPLICATION OF THAT SECTION.

On page 20 of the opening brief Appellant asserts that his contention that the United States District Court for the Territory of Hawaii is not one of the "courts of the

United States" was "squarely raised and settled" in *U.S. v. Mookini*, 303 U.S. 201, 82 L. Ed. 748.

The direct holding in the Mookini case was that the Rules promulgated by the Supreme Court in 1934 for criminal cases originating "in District Courts of the United States and in the Supreme Court of the District of Columbia" were not applicable to the United States District Court for the Territory of Hawaii. The Rules had been drafted by the Attorney General of the United States and submitted to the Court with a recommendation that they be confined to the continental United States because of a lack of data on the special conditions which might require different treatment for the non-continental courts and in reaching the conclusion it did, the Court based its decision primarily on the fact that in considering and revising the draft it had approved and intended to follow the Attorney General's recommendation. The Court then added:

"The term 'District Courts of the United States,' as used in the rules without an addition expressing a wider connotation, has its historic significance. It describes the constitutional courts created under article 3 of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States.' " (p. 751).

It is seen from the foregoing review that the Supreme Court did not hold that the United States District Court for the Territory of Hawaii is not a "court of the United States" and it further appears that even the term "District

Courts of the United States" might have a less restricted meaning than the Court thought appropriate to its use in the particular circumstances of the case before it. We cannot concede the applicability herein of the Mookini case. But even if the Supreme Court had held, as claimed, that the United States District Court for the Territory of Hawaii was not a court of the United States, Appellant's technique in endeavoring to utilize the holding by extracting the term "courts of the United States" from its setting in Section 86 of the Organic Act, affixing the meaning purportedly given it in its use in such other connection, and then trying to force a construction of the statute to accommodate that meaning, runs contrary to approved methods.

" . . . To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute . . ."

U.S. v. American Truck Assns., 310 U.S. 534, 84 L. Ed. 1345 at 1350

" . . . The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. Compare *Rein v. Lane*, L. R. 2 Q.B. 144, 151. The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection."

Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 79 L. Ed. 211 at 218.

The authorities referred to in the Mookini case recognize, as do many others that could be cited, that there are two general types or classes of courts which Congress might have occasion to deal with. One, the constitutional, includes those courts which are created under and derive their judicial authority from Article III of the Constitution defining the judicial power of the United States. The other, the legislative, includes those which are created by and derive their judicial authority from Congress acting under an enabling provision of the Constitution such as Section 3 of Article IV giving it power to make rules and regulations for the Territories. But whether a court falls into one or the other category can be of real significance only when the litigated issue calls for a determination of whether or not an enactment affecting a court is consistent with the powers conferred or the limitations imposed upon Congress by the Constitution.

There are cases, typified by *O'Donoghue v. U.S.*, 289 U.S. 516, 77 L. Ed. 1356, cited in the opening brief (p. 20), where a determination of the classification of the particular court under consideration decides the issue, but where, as here, the question involves only the interpretation of language used in describing a court, the actual nature or classification of the court should be of little importance. As has been mentioned before we are not concerned with a measurement of legislative authority but are involved only in determining the legislative intent so there is no necessity for a hyper-critical scrutiny of the labels Congress has used to tab the various courts mentioned in Section 86 when the purpose intended to be effectuated by the legislation is otherwise made patent.

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure."

Atlantic Coast Line Railroad Co. v. Burnette, 239 U.S. 199, 60 L. Ed. 226 at 227.

"It must be admitted that the words 'United States district court' were not accurately used, as the United States court in the Indian territory was not a district or circuit court of the United States (Re Mills, 135 U.S. 263, 268 [34: 107, 110]), and no such court had, at the date of the act, jurisdiction therein. But as, manifestly, the appeal was to be taken to a United States court having jurisdiction in the Indian territory, and in view of the other terms of the act bearing on the immediate subject-matter, to say nothing of subsequent legislation, it is clear that the United States court in the Indian territory was the court referred to . . ."

Stephens v. Cherokee Nation, 174 U.S. 445, 43 L. Ed. 1041 at 1052.

See also:

The Coquitlam v. U.S., 163 U.S. 546, 41 L. Ed. 184 at 186.

The District Court of the Territory of Hawaii is a legislative court, but that fact does not prevent it from being considered a court of the United States (*Ex parte Bakelite Corporation*, 279 U.S. 438, 73 L. Ed. 789 at 798; *Hunt v. Palao*, 4 How. 589, 11 L. Ed. 1115; *Ex Parte Norvell*, 20 Wash. D.C. 348). The substantive provisions of Section 86 indicate that Congress must have considered it a court of the United States for it is only when it is so considered that the words "removal of causes" can play any effective part in the conformity clause under consideration.

The Organic Act itself labels the District Court it created as a court of the United States.

The act was divided into six chapters with appropriate chapter and section titles and headings. Chapter IV of the act was entitled "The Judiciary" and the first section of the chapter, Section 81, established the Territorial courts in Hawaii by the following language:

"That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish."

The classification and enumeration of Territorial courts was complete and it will be noted that the United States District Court for the Territory of Hawaii was not included in that classification (*U.S. v. Bowers, supra*).

Chapter 5 of the act was entitled "United States Officers." Section 86, included in Chapter 5, created the District Court for the Territory and was entitled "Federal Court." Turning to the title, as we may, (*Robinson v. U.S.*, 42 Ct. Cl. Fed. 52; *Maguire v. Commissioner of Internal Revenue*, 313 U.S. 1, 85 L. Ed. 1149 at 1154) it is clear then that the act itself designates the court as a "Federal Court" or in other words, a United States Court.

The legislature's contemplation of the District Court as a court of the United States is further evidenced by that portion of Section 86 providing for the appointment of a "district judge . . . of the United States," for it is obvious that if the judge presiding over a court is called a "judge of the United States," the court over which he presides must be a "court of the United States."

From the foregoing Appellee submits that whatever

type of court the United States District Court for the Territory of Hawaii may be considered to be in respect to other legislation, that so far as the Hawaiian Organic Act and Section 86 thereof are concerned, it is a court of the United States.

(4)

THE PHRASE "REMOVAL OF CAUSES" IN SECTION 86 OF THE ORGANIC ACT REFERS TO TRANSFERS FROM THE TERRITORIAL TRIAL COURTS TO THE FEDERAL DISTRICT COURT AND NOT TO APPELLATE TRANSFERS.

Appellant states and assumes as a basis for urging that the phrase "removal of causes" refers only to appellate transfers, that the statute was originally entitled "Writs of Error and Appeal" (Op. Br. pp. 21 and 24). The error in the premise has already been disclosed. We have observed that Section 86 of the Organic Act was originally enacted as a single paragraph under the heading "Federal Court" (ante, pp. 4 and 16).

In subsequent amendments Section 86 was broken down into four separate paragraphs. The first two sentences of the one containing the conformity clause were eventually written as Section 645, Title 48 U.S.C.A. The section heading relied upon by Appellant was inserted in that codification and consequently is of no significance in construing the act (*Olson v. City of Sioux Falls*, 63 S.D. 563, 262 N.W. 85 at 87; *Campbell v. City of Helena*, 92 Mont. 366, 16 P. (2d) 1 at 4).

The import and limitation of the term "removal of causes" confining it to transfers between trial courts is too well understood to permit its being twisted to mean or include transfers by appeal. It may signify a change of venue, as is pointed out in the opening brief (p. 24), but there too the transfer is lateral, that is, from one trial court

to another trial court. Even in its general sense the term is never used in legal parlance to denote vertical transfers and in its specific sense, it definitely means transfers from state trial courts to Federal District Courts (*Black's Law Dictionary*). Further, the wording of the statute, "*the laws of the United States* relating to removal of causes," indicates that what was intended to be referred to were the particular laws included in what now appears as Chapter 3 of Title 28 U.S.C.A. under the heading "District Courts; Removal of Causes," all of which pertain to transfers from state trial courts to district courts of the United States.

The term, "removal of causes," is an integral part of Section 86 and as such should be given effect.

"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, section 2, it was said that 'A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized, is, that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Washington Market Co. v. Hoffman, 101 U.S. 112,
25 L. Ed. 782 at 783

U.S. v. Standard Brewery, 251 U.S. 210, 64 L. Ed.
229 at 234-235

Louisville & N. R. Co. v. Mottley, 219 U.S. 467,
55 L. Ed. 297 at 300-301

U.S. v. United Verde Copper Co., 196 U.S. 207,
49 L. Ed. 449 at 452.

When Appellant's proposal that the phrase under consideration refers to appellate transfers is rejected, as we submit it must be, then the phrase on removals can be given effect only by a construction which will permit the transfer of causes from the Territorial trial courts to the Federal District Court for the Territory. To hold otherwise will necessitate treating the legislature's very specific language on removals as surplusage in direct violation of the principle laid down in the authorities just referred to.

The fallacy of Appellant's contention to the contrary may be further exposed by an analysis of the argument offered on pages 21 and 22 of the opening brief where it is urged that the phrase "courts of the United States," used twice in the second sentence of the statute, (48 U.S. C.A. Sec. 645), "has the same meaning in both places as including the mainland federal courts, the United States Circuit Courts of Appeals and the Supreme Court of the United States," and that consequently "the phrase 'as between the courts of the United States and the courts of the Territory of Hawaii' can mean nothing more than the relations between the Circuit Court of Appeals and the United States Supreme Court on the one hand and the Supreme Court of the Territory of Hawaii on the other."

Appellee fully agrees that the words "courts of the United States" must have a similar meaning in each instance it is used in the statute. But Appellant's argument that the phrase includes the "Circuit Courts of Appeals" disregards entirely the fact that at the time the Organic Act was adopted no appeal could be taken from a state court to a Circuit Court of Appeals (*Hind v. Wilder's Steamship Co.*, *supra*, 13 Haw. 174 at 180). The

Circuit Courts of Appeals were out of the picture completely so that the plural form of "courts of the United States" when first used in the statute could only signify the United States Supreme Court and the Federal District Courts in the various states. A corresponding application therefore requires an interpretation that when used the second time, the phrase, "courts of the United States," means the United States Supreme Court and the United States District Court for the Territory of Hawaii.

The use of the plural in the phrase "the courts of the Territory of Hawaii" is of equal significance for if Appellant's proposal that the conformity clause pertained wholly to appellate transfers were correct, then obviously the singular would have been used since the Hawaiian Supreme Court would have been the only court in the Territory affected. (Appeals from the Federal District Court were and are specifically and separately regulated by the preceding sentence of Section 86, that is, the first sentence of 48 U.S.C.A. 645.) As we are justified in assuming that the plural was used advisedly in the above connection, it necessarily follows that the phrase "courts of the Territory of Hawaii" also includes the circuit and other trial courts of the Territory which courts could only be brought into relationship with the Federal Judicial system through the United States District Court for the Territory of Hawaii.

Appellant directs attention to the language used in the comparable section of the Foraker Act establishing a government for Puerto Rico which reads in part:

"The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters or proceedings as between the courts

of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico.”

(Act Apr. 2, 1900, 31 Stat. 84, c. 191, sec. 34; 48 U.S.C.A. 864.)

It is stated in reference to the above that had Congress intended the removal provision to apply in this Territory a similar concluding phrase such as “between the Courts of the Territory of Hawaii and said District Court” would have been employed in Section 86 (Op. Br. p. 22). The argument overlooks the fact that in the case of Puerto Rico the appellate relationship between its Supreme Court and the Federal system was not made to correspond to the procedure prescribed for that relationship between the state supreme courts and the Federal system (Section 35 of the Foraker Act, *supra*,) so that, unlike with Hawaii, only one Federal court was involved which naturally permitted the designation of the particular court affected.

The real significance of the Foraker Act to the issue of construction raised on this appeal lies in the fact that the language—“the laws of the United States relating to . . . removal of causes” appearing in our act (which was enacted but a few days after the Foraker Act) can hardly mean anything different from the identical language of the Puerto Rican Act, in respect to which the Appellant practically admits, as he must, that the provision on removals pertains not to appeals but to lateral transfers of causes from the Puerto Rico trial courts to its Federal District Court (Op. Br. pp. 22-23, and see *Peo. of Porto Rico v. Fortuna Estates*, C.C.A. 1, 279 F. 500, cert. denied 259 U.S. 587, 66 L. Ed. 1077).

THE CONSTRUCTION OF 28 U.S.C.A. SECTION 76 IS NOT INVOLVED ON THIS
APPEAL.

28 U.S.C.A. Section 76 (Section 33 Judicial Code)
reads in part:

“When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, . . . for or on account of any act done under color of his office or in the performance of his duties as such officer, . . . the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court . . . upon the petition of such defendant . . .”

We do not dispute Appellant's contention that the word “state” in the above statute does not include a Territory and we accept the conclusion reached in 13 Opinions of the Attorney General 584 cited in the opening brief (p. 14) for the proposition that the statute does not apply to a territory. But that holding proves nothing on this appeal except to show the reason and necessity for the inclusion of the conformity provision in Section 86 of the Hawaiian Organic Act in order to make removals to the Federal Court possible in this Territory.

Stress is placed in the opening brief on an argument revolving around the proposition that it would be inadvisable to have the provisions of 28 U.S.C.A. 76 operative in the Territory of Hawaii (Op. Br. pp. 12-17). The argument is directed against the wisdom of legislation which of course is purely a matter for the determination of Congress (*Southern Steamship Co. v. National L. Rel. Bd.*, — U.S. —, 62 S. Ct. 886, 86 L. Ed. 815 at 822). In the forepart of this brief it has been shown that the

amended petition for removal to the District Court set forth that at the time of the killing referred to in the Territorial indictment the defendant was acting as a customs officer which is one of the Federal officers covered by the statute (*Ex Parte Dickson*, 14 F. (2d) 609 at 613). The petition contained sufficient averments relative to the defendant's acting under color and authority of office to bring the cause within the privilege and protection of the statute. So that the only question here involved is whether or not 28 U.S.C.A. Section 76 was made applicable by Section 86 of the Hawaiian Organic Act, and it is entirely aside from any point as well as incorrect for Appellant to urge that 28 U.S.C.A. 76 is a criminal statute and should be strictly construed (Op. Br. pp. 24-25). It appears from the above quoted portion of the statute that it applies to civil suits as well as to criminal prosecutions against Federal officers and that it is remedial in character. Where open, the statute should therefore be given a liberal construction (*Colorado v. Symes*, 286 U.S. 510, 76 L. Ed. 1253 at 1257-8).

Likewise, Appellant's reliance upon the reasoning of the opinion of the United States Attorney General above referred to seems entirely misplaced. The type of judicial system existing in the Territory of Montana is shown by the opinion to have been so dissimilar to that created for Hawaii that what the Attorney General said incidentally in reaching his holding has no bearing herein unless it be to emphasize the point that Congress intended to depart from the usual Territorial standard in establishing the two system judiciary for Hawaii.

Tenn. v. Davis, 100 U.S. 257, 25 L. Ed. 648, is also referred to by Appellant for the historical function and

purpose of 28 U.S.C.A. Section 76 (Op. Br. pp. 12-13). But nothing stated in that opinion relative to the desirability of providing a speedy remedy for the extrication of a Federal officer who has become entangled with state law and local agencies could not apply equally to a Territory of Hawaii's caliber. (See *Peo. v. Fortuna Estates*, 10 Porto Rico Fed. 130 at 134, affirmed *Peo. v. Fortuna Estates*, *supra*, and *Maryland v. Soper*, 270 U.S. 9, 70 L. Ed. 449 at 457). The discussion could be extended. However, in the final analysis, the feature under discussion is purely one of legislative policy, and if Congress has seen fit to provide for the removal of causes from the insular courts of Puerto Rico to the Federal District Court for that United States possession (ante, p. 21) certainly the same policy would justify a similar regulation for the Territory of Hawaii.

Appellant endeavors to make a distinction in the application of the removal provision of Section 86 of the Organic Act between causes over which the Federal District Court might have assumed jurisdiction if the suit had been brought in it in the first instance and those causes, such as are covered in 28 U.S.C.A. 76, where the Federal court could have no original jurisdiction (Op. Br. pp. 10, 13-14). The argument is not developed but the intimation is that removals may be permissible in the former case but not in the latter. The answer to the proposition appears very definitely from the inclusive language of the statute, which we repeat:

"The laws of the United States relating to . . . removal of causes . . . shall govern . . ."

No exceptions are set forth and none should be held as intended.

“To be governed by the law is to be governed not only by a part, but by the whole law relating to the subject.”

Fisher v. Brower, 159 Ind. 139, 64 N. E. 614 at 618.

POINT 2.

THE PROVISIONS OF SECTION 86 OF THE ORGANIC ACT RELATING TO THE REMOVAL OF CAUSES HAVE NOT BEEN REPEALED.

For more convenient reference the portion of Paragraph (d) of Section 86 of the Hawaiian Organic Act now constituting 48 U.S.C.A. 645 is set forth hereunder :

“Writs of error and appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as writs of error and appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.”

Although Section 86 of the Organic Act has been subject to numerous amendments the above portion now reads as it was originally enacted with the exception that the designation “district courts” in the sixth line has been substituted for “circuit courts” to provide an adjustment necessitated by the abolition of the latter courts.

It is Appellant’s contention that the second sentence of the above statute, being what we have denominated the conformity clause, has been impliedly repealed and completely eradicated by subsequent legislation. The Act of

March 3, 1911, Chap. 231, 36 Stat. at L. 1087, is mentioned but the provisions of 28 U.S.C.A. 225 are particularly credited with having accomplished that result (Op. Br. pp. 18-20).

Appellee's reply is that although the provisions of the conformity clause relating to appeals have been modified by such subsequent enactments, the remaining portion thereof has not been affected and still remains in force.

Section 86 of the Organic Act was first amended by the Act of March 3, 1905, Chapter 1465, 33 Stat. at L. 1035, which added a proviso extending the right of appeal from the Territorial Supreme Court to the United States Supreme Court to also include cases where the amount involved exceeded five thousand dollars.

By the Act of March 3, 1909, Chapter 269, 35 Stat. at L. 838, Section 86 of the Organic Act was further amended by changing its form to four paragraphs instead of one and by increasing the number of judges of the United States District Court to two. The provisions relating to the procedure of the District Court, being what is now the first sentence of 48 U.S.C.A. 645, were also amended by the addition of a regulation allowing appeals and writs of error to the Supreme Court from the District Court in those cases where appeals and writs of error were allowed from district and circuit courts to the Supreme Court of the United States.

The next amendment was by the Act of March 3, 1911, Chapter 231, 36 Stat. at L. 1087, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary." The substance of Section 246 of the Code is set forth at page 18 of the opening brief. That section codified, but in no other way modified the existing law

regulating appeals from the Territorial Supreme Court, and whether it be considered as having superseded or as merely continuing the provisions of Section 86 of the Organic Act relating to such appeals, nothing in Section 246 or in any of the other sections of the Code affected the removal provisions of Section 86. Such is further made certain by Section 297 of the Code which repealed a number of specified laws and continued :

“Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed.”

The Act of January 28, 1915, Chapter 22, 38 Stat. at L. 803, amended Section 246 of the Judicial Code by including the Supreme Court of Puerto Rico within its provisions and by providing two additional methods for reviewing the decisions of the Supreme Courts of Hawaii and Puerto Rico, namely, by certiorari from the United States Supreme Court and by writ of error or appeal to the Circuit Courts of Appeals where the amount involved exceeded the value of five thousand dollars. It modified Section 86 of the Organic Act in so far as appeals from the Territorial Supreme Court were concerned but had no effect on removals.

Section 313 of the Act of July 9, 1921, Chapter 42, 42 Stat. at L. 108, again amended Section 86 of the Organic Act. Section 86 was rewritten in full but the provisions of the first two sentences of paragraph (d), with which we are directly concerned, were written just as they appeared after the amendment by the Act of March 3, 1909, Chapter 269, 35 Stat. at L. 838 (ante, p. 26). The

Act of 1921 therefore conflicted with Section 246 of the Judicial Code in so far as appeals from the Supreme Court of the Territory of Hawaii were concerned, but there is no necessity of attempting to reconcile that conflict since it did not pertain at all to the removal provision. It can safely be said that whatever may have been the status of appeals from the Territorial Supreme Court at this stage, the law on removal of causes remained as originally enacted.

Nor did the next amendment of Section 86 by the Act of February 12, 1925, Chapter 220, 43 Stat. at L. 890, alter the situation. That amendment affected only paragraph (a) of Section 86 (48 U.S.C.A. Section 641) which covers such matters as the number and salaries of the judges of the District Court, its sessions and the like.

The foregoing review is rather protracted but it serves the purpose of showing that prior to February 13, 1925, no legislation had been adopted which by any stretch could be held to have superseded or repealed, either directly or impliedly, the removal provisions of the conformity clause of Section 86 of the Organic Act. It clears the way for an unobstructed view of Appellant's proposal that the provisions of 48 U.S.C.A. 645 (Paragraph d, Section 86, Organic Act) have been completely wiped out by 28 U.S.C.A. 225 (Op. Br. pp. 19-20).

28 U.S.C.A. 225 is Section 128 of the Judicial Code of 1911 (36 Stat. at L. 1087) as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. at L. 936. Prior to the amendment Section 128 dealt only with appeals to the circuit courts of appeal from the district courts, including the United States District Court for the Territory of

Hawaii. The Act of 1925 amended the section to read in pertinent part as follows:

"Sec. 128 (a) The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions. . . .

Second. In the United States district courts for Hawaii and for Porto Rico in all cases. . . .

Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds \$5,000, and in all habeas corpus proceedings. . . ."

The provisions of the Fourth subdivision are clearly incompatible with the second sentence of Paragraph (d) of Section 86 of the Organic Act (48 U.S.C.A. 645) since the former vests appellate jurisdiction over the Supreme Court of the Territory in this Court to the complete exclusion of the direct appeals to the United States Supreme Court allowed as in the case of a state supreme court by Paragraph (d) of Section 86 of the Organic Act. In view of this conflict there is no doubt that the right of appeal from the Supreme Court of the Territory of Hawaii to the United States Supreme Court no longer exists. But Appellant's quick conclusion that, "That being so, there is nothing left of the second sentence of 48 U.S.C.A. Section 645" (Op. Br. p. 19) is a non sequitur of high rank.

As we have seen, the second sentence of 48 U.S.C.A. 645 deals not only with appellate jurisdiction over the Territorial Supreme Court but also with removals and "other matters and proceedings" between the Territorial trial courts and the Federal district court. The conflict

pointed out by Appellant affects only the appellate provisions of the statute and consequently the scope of the repeal does not extend beyond those provisions.

That repeals by implication are not favored is a basic rule (*U.S. v. Jackson*, 302 U.S. 628, 82 L. Ed. 488 at 491; *Posadas v. National City Bank*, 296 U.S. 497, 80 L. Ed. 351 at 355; *U.S. v. Noce*, 268 U.S. 613, 69 L. Ed. 1116 at 1119). The rule's equally familiar variant, particularly applicable here, is to the effect that an act which is inconsistent with but which does not cover the entire subject matter of a prior statute will not effect a repeal of the provisions of such prior statute beyond the extent of the inconsistency.

"When there are two Acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy . . ."

Chicago M. & St. P. R. Co., v. U.S., 127 U.S. 406, 32 L. Ed. 180 at 182.

"It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute."

Frost v. Wenie, 157 U.S. 46, 39 L. Ed. 614 at 619.

See also:

Crawford Statutory Construction, Sec. 326, pp. 674-675

59 C.J. 923, Sec. 523.

The Act of February 13, 1925 was confined to amendments of sections of the Judicial Code regulating the appellate jurisdiction of the Circuit Courts of Appeal and the United States Supreme Court. Non-appellate matters, such as removals, were entirely foreign to the act. It follows then from an application of the above principles that the effect of the Act of 1925 on Section 86 of the Organic Act was to repeal only the provisions relating to appeals from the District Court and from the Supreme Court of the Territory. Not only is such limitation of the repeal apparent from a consideration of the extent of the repugnancy of the terms of the two acts but it has also been expressly so limited.

Section 13 of the Act of February 13, 1925 provides:

“That the following statutes and parts of statutes be, and they are, repealed:”,

then enumerates certain acts and parts of acts, including Section 246 of the Judicial Code which we have noted was in conflict with Section 86 of the Organic Act, and also:

“So much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii.”

The foregoing provision limits the repeal to the elimination of appeals to the United States Supreme Court from the Hawaiian Supreme Court and from the Federal District Court for the Territory of Hawaii. It defines the extent to which the Act of February 13, 1925 interferes with Section 86 of the Organic Act and excludes any implication of a more extended repeal (*Great Northern Ry. Co. v. U.S.*, C.C.A. 8, 155 F. 945 at 953, affirmed 208

U.S. 452, 52 L. Ed. 567). It affords double assurance that the Appellant's contention that the removal provisions of Section 86 of the Organic Act have been eradicated is erroneous.

CONCLUSION

It is respectfully submitted that the United States District Court for the Territory of Hawaii had the authority to and did properly acquire and retain jurisdiction of the Territorial indictment returned against the Appellant and that therefore the judgment appealed from should be affirmed.

Dated at Honolulu, T.H., this 18th day of July, 1942.

Respectfully submitted,

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Attorney for Appellee.*

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No. 10,065

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN KONG YEUNG,

Appellant,

VS.

TERRITORY OF HAWAII,

Appellee.

REPLY BRIEF OF JOHN KONG YEUNG.

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PAUL P. O'BRIEN,

CLERK

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN KONG YEUNG,

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VS.

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Appellee.

REPLY BRIEF OF JOHN KONG YEUNG.

The Appellant's Opening Brief and the Appellee's Answering Brief clearly expose the head-on conflict on the sole issue to be decided in this case, to wit, whether the United States District Court for the Territory of Hawaii had the legal authority to take jurisdiction of the present indictment. The first question set forth on page 3 of the Answering Brief is not quite accurate. It should read: Does Section 86 of the Hawaiian Organic Act make 28 U.S.C.A. Sec. 76 applicable between the Territorial trial courts and the United States District Court for the Territory of Hawaii? The second question appears to be correct.

Appellee's anticipatory suggestion on page 7 of its brief that the Court will be "reminded" in this brief that the comment in *Hind v. Wilder's Steamship Co.*,

13 Haw. 174, 108 Fed. 113, 183 U. S. 545, 46 L. Ed. 321, on removal of causes is pure dictum does not deter us from emphatically so reminding the Court. Appellee's suggestion is nevertheless significant as an admission that neither this Court nor the United States Supreme Court has ever adjudicated the present issue. The conclusion reached by the District Court, based upon its confused reasoning in *Farm Corn v. Wardell*, 4 U. S. D. C. Haw. 605, has no more weight than the action of the same District Court in assuming jurisdiction in the present case. So, Appellee's abrupt conclusion that this Court "has ruled adversely to Appellant's contention" is clearly something less than true. (Answering Brief p. 7.)

It is equally inaccurate to argue, as has Appellee, that the United States Supreme Court did anything more in the *Wilder* case than to hold that under Sec. 86 of the Organic Act there was no appeal from the Supreme Court of the Territory of Hawaii to this Court. In fact, the Supreme Court in its opinion carefully confined its discussion to the appellate relationship between the courts of the Territory of Hawaii and the mainland United States courts. We have no hesitation in asserting that the present issue is an open one and that there is no case in the books that can be said to be in any way controlling.

We agree with Appellee that this Court "is at liberty to look to the general purpose and historical background" of a statute "for assistance in determining its proper meaning". (Answering Brief p. 8.) Surely this universal principle of statutory construc-

tion is as applicable to 28 U.S.C.A. Sec. 76 as it is to 48 U.S.C.A. Sec. 645. That very principle brings us to what we conceive to be the basic difficulty with Appellee's entire argument. That is, that the final result achieved by its reasoning is an absolute absurdity in the light of the historical function and purpose of 28 U.S.C.A. Sec. 76. The fallacy in Appellee's reasoning is well summed up in the following statement from pages 10-11 of its Answering Brief. "Since the general purpose of Congress was to place the Territorial courts in the same relationship to the Federal judicial system in which the state courts stood, it logically follows that Congress intended that each and every incident of that relationship, including the removal of causes, should also pertain between the Territorial and Federal judicial systems." There is nothing whatever in the original intent of Congress to limit appellate jurisdiction over Hawaii as in the case of states to justify the conclusion that it likewise intended to provide for removal from one court appointed and controlled by the President and Congress to another court appointed and controlled in exactly the same manner, both created under the authority of the same provision of the Federal Constitution. If, as the United States Supreme Court suggested in *In re Wilder's Steamship Co.*, *supra*, Congress considered that "owing to the great distance of the Territory of Hawaii from the continent, the appellate jurisdiction over that territory should be more restricted than over other territories", is it likely that at the same time it intended to vest jurisdiction over terri-

torial criminal indictments in the District Court from which an appeal could be had as of right to this Court?

Basic to all of the conflicting rules of statutory construction called to the Court's attention in the two briefs already filed is the rule that statutes should be so construed as to effect reasonable and rational results rather than absurd and unreasonable ones.

Glover v. United States, 164 U. S. 294, 41 L. Ed. 440, 441.

We frankly do not understand Appellee's implication that the analysis of the historical function and purpose of 28 U.S.C.A. Sec. 76 in *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648, is irrelevant because "Hawaii's calibre" is similar to that of "state law and local agencies". Appellee states "the discussion could be extended" (Answering Brief p. 24) and we wish it had because it seems obvious that Hawaii's status as an incorporated Territory is altogether different from that of a state. If there is anything that can be said about the Hawaii judiciary that is unanswerable, it is that the control of the President and Congress over it is absolute and complete. It is one of the fundamental facts of governmental organization in Hawaii, as any resident can testify. The same may be said, with equal truth, of the legislative and executive branches of the territorial government. There is no reason or justification for the existence of a "speedy remedy for the extrication of a Federal officer who has become entangled with state law and local agencies" in Hawaii. (Answering Brief p. 24.)

Appellee concedes that the word "state" in 28 U.S.C.A. Sec. 76 does not include "territory" and

accepts the conclusion reached in 13 *Opinions of the Attorney General* 584. (Answering Brief p. 22.) What Appellee has overlooked is that the very same line of reasoning which requires the foregoing statute to be so construed as to exclude territories leads to exactly the same result as to 48 U.S.C.A. Sec. 645. And that is, of course, that it is simply senseless to have removal between courts constituted in an identical manner.

We infer that Appellee has no quarrel with the reasoning of the United States Supreme Court in *Tennessee v. Davis, supra*. That being so, it cannot and in fact makes no attempt to meet our contention that the construction of 48 U.S.C.A. 645 which it urges upon this Court leads to an absurd situation. Appellee purports to sum up our argument on the point as "the proposition that it would be inadvisable to have the provisions of 28 U.S.C.A. 76 operative in the Territory of Hawaii". (Answering Brief p. 22.) That is, of course, not our contention at all but only a straw man which is very easily demolished. What we say is that to have 28 U.S.C.A. Sec. 76 operate in Hawaii completely defeats its historical purpose and function and that its operation there is utterly uncalled for, unnecessary and superfluous. This being so, this Court is by no means bound to so construe 48 U.S.C.A. 645 as to bring about this result but certainly has the power and right to place such a construction on the statute as will produce a reasonable and rational result. The question is not one of "advisability" but of how the statutes themselves should be construed.

“One of the established rules for the construction of statutes is that they should have a rational, sensible construction, if their meaning is at all doubtful.”

25 *R.C.L.* 1018.

We contend that to so construe 48 U.S.C.A. Sec. 645 as to make 28 U.S.C.A. Sec. 76 applicable in the Territory of Hawaii is utterly irrational and senseless. As we have already suggested, this can be avoided by construing the words “removal of causes” as meaning generally “the transfer from one court to another” by appeal, writ of error or other writ and by construing “courts of the United States” as meaning the constitutional mainland Federal courts.

The same result can be achieved in another way. 28 U.S.C.A. Sec. 76 is more than a mere removal statute. As we pointed out in our Opening Brief, it is clearly distinguishable from 28 U.S.C.A. Sec. 71 because it covers causes of which the District Court had no original jurisdiction. Thus while it is true that 28 U.S.C.A. Sec. 76 relates to the removal of causes, it also confers jurisdiction upon District Courts in criminal matters which they otherwise would not have. Construing 48 U.S.C.A. Sec. 645 and 28 U.S.C.A. Sec. 76 together, it is entirely logical to conclude that it was not the intent of Congress to include anything more than pure removal statutes such as 28 U.S.C.A. Sec. 71.

On page 23 of its Answering Brief, Appellee argues that “it is entirely aside from any point as well as incorrect for Appellant to urge that 28 U.S.C.A. 76

is a criminal statute and should be strictly construed". What Appellee overlooks is that this Court is necessarily confronted with the task of construing 48 U.S.C.A. Sec. 645 and 28 U.S.C.A. Sec. 76 together if it is going to arrive at an answer to the sole question presented by this appeal. 28 U.S.C.A. Sec. 76 is a criminal statute and it clearly begs the question to argue, as has Appellee, that the statute is remedial in character and should therefore be given a liberal construction. That it is remedial in states goes without saying but just the opposite is true in Hawaii. There is absolutely nothing in the territorial situation which requires or justifies or creates any place for any such remedy. The statute as applied to Hawaii would be an anomaly.

Appellee has obviously missed the point in connection with the contrast between Porto Rico and Hawaii. While it is true that the Justices of the Supreme Court of Porto Rico were appointed as are the judges of the Hawaii courts, the judges of the lower courts of Porto Rico were largely left under the control of the Governor, executive council and the local legislative assembly. *Sec. 33, Act April 12, 1900, c. 191, 31 Stat. 84.* There was therefore a logical reason for providing for removal from the Porto Rico trial courts to the District Court there. Just the opposite situation obtains in Hawaii. Here the trial judges are appointed in exactly the same manner as the Justices of the Porto Rico Supreme Court, the Supreme Court of the Territory of Hawaii and the judges of the United States District Court for the Territory of Hawaii. The Porto Rico trial courts

are thus local agencies in very much the same sense as state courts and there was a valid and logical reason why removal should be had and Congress doubtless so intended. There is therefore no validity in Appellee's conclusion that the policy of Congress in regard to Porto Rico "would justify a similar regulation for the Territory of Hawaii". (Answering Brief p. 24.)

Finally, assuming that to be true which we deny, namely that 48 U.S.C.A. Sec. 645 originally made 28 U.S.C.A. Sec. 76 operable in the Territory of Hawaii, we urge that the second sentence of the former statute has been wholly repealed by the various subsequent enactments cited in both the Opening and Answering Briefs. As the U. S. Supreme Court held in the *Wilder* case, 48 U.S.C.A. Sec. 645 set up a unique relationship for Hawaii by allowing an appeal from the Territorial Supreme Court to the United States Supreme Court but only in such cases as could be appealed from State Supreme Courts. That entire relationship has now been altered to allow appeals directly to this Court.

If, as Appellee contends, criminal cases such as this can be removed from the Circuit Courts of Hawaii to the District Court, we have a confusing situation in which the District Court and this Court too may be and virtually inevitably will be called upon to construe Territorial statutes which have not as yet even been ruled upon by the Supreme Court of Hawaii. The United States Supreme Court in the recent case of *Waialua Agricultural Co. v. Christian*, 305 U. S. 91, 83 L. Ed. 60, invoked the "manifest

error” doctrine as to appeals from the Supreme Court of Hawaii to this Court. It would seem to be utterly inconsistent with this policy to allow removal from the Circuit Courts of Hawaii to the District Court. If removal were possible, the statutory law of Hawaii would of course govern in the District Court. Would this Court on appeal be bound by the “manifest error” doctrine as laid down in the *Waialua* case? Would the Supreme Court of Hawaii in another and subsequent case be bound by this Court’s interpretation of Hawaii statutes? Or would the Hawaii Supreme Court in such a case be free to place its own construction on Hawaii statutes? The purpose of 28 U.S.C.A. Sec. 76 was to afford revenue officers a fair trial where such might conceivably be denied or impossible in state courts, not to introduce such an important element of uncertainty into the trial of criminal cases.

The second sentence of 48 U.S.C.A. Sec. 645 is completely without vitality. We can not agree that one phrase of the sentence can stand with the entire balance repealed. The sentence, taken as a whole, originally created a relationship between the Supreme Court of Hawaii and the U. S. Supreme Court which has ceased to exist.

CONCLUSION.

The operation of 28 U.S.C.A. Sec. 76 in Hawaii is not only “inadvisable” but also illogical and irra-

tional. We urge that this absurd result be avoided by any or all of the three avenues above outlined.

Dated, Honolulu, Hawaii,
August 10, 1942.

Respectfully submitted,

CASS & SILVER,

By PHILIP SILVER,

*Counsel for Appellant,
John Kong Yeung.*

116
16
14/42
No. 10090

United States

Circuit Court of Appeals

For the Ninth Circuit.

SAMUEL POORMAN, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States
Board of Tax Appeals.

FILED

MAY 11 1942

PAUL P. O'BRIEN,

CLERK

No. 10090

United States
Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

Pro se

For Comm'r:

B. M. COON, Esq.

Docket No. 102994

SAMUEL POORMAN, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1940

May 27—Petition received and filed. Taxpayer notified. Fee paid.

“ 27—Copy of petition served on General Counsel.

“ 27—Request for Circuit hearing in Los Angeles filed by taxpayer. 5/27/40 copy served.

Jul. 22—Answer filed by General Counsel.

“ 25—Copy of answer served on taxpayer. Los Angeles, Calif.

Dec. 30—Hearing set Feb. 17, 1941 in Los Angeles, Calif.

1941

Feb. 18—Hearing had before Mr. Mellott on the merits. Submitted. Petitioner's brief due April 4, 1941—respondent's May 19, 1941 and petitioner's reply June 3, 1941.

Mar. 5—Transcript of hearing of Feb. 18, 1941 filed.

Apr. 1—Brief filed by taxpayer. 4/1/41 copy served.

“ 25—Reply brief filed by General Counsel.

May 20—Reply brief filed by taxpayer. 5/20/41 copy served.

Sep. 12—Findings of fact and opinion rendered, Mr. Mellott. Decision will be entered for the respondent. 9/16/41 copies served.

“ 16—Decision entered, Mellott, Div. 11.

Dec. 5—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

“ 5—Affidavit of service by mail filed by taxpayer.

“ 12—Statement of evidence filed by taxpayer.

“ 27—Motion for extension to Feb. 16, 1941 to prepare and transmit record filed by taxpayer. 12/30/41 motion returned to taxpayer.

1942

Jan. 10—Praecipe for record filed by taxpayer.

“ 12—Order from 9th Circuit granting motion for extension to Feb. 16, 1942 to prepare and transmit record filed.

1942

Jan. 13—Proof of service of praecipe filed.

Feb. 12—Order from 9th Circuit granting motion
for extension to March 16, 1942 to pre-
pare and transmit record filed.

Mar. 3—Agreed statement of evidence filed. [1*]

United States Board of Tax Appeals

Docket No. 102994

SAMUEL POORMAN, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:LA PAK-90D, dated March 27, 1940, and as a basis for his proceeding, alleges as follows:

I.

The petitioner is an individual with residence at Hotel Mayfair, No. 1256 West Seventh Street, in the City of Los Angeles, State of California, and

*Page numbering appearing at foot of page of original certified Transcript of Record.

office at No. 207 South Broadway in said City. The return for the period here involved was filed with the Collector for the Los Angeles Division, Sixth District of California. [2]

II.

The Notice of Deficiency, (a copy of which is attached and marked "Exhibit A"), was mailed to the petitioner on March 27, 1940.

III.

The taxes in controversy are income taxes for the calendar year 1937, and in the amount of \$708.92.

IV.

The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The inclusion in taxable income, (as additional income), of the sum of \$8,394.92 paid to the petitioner by Los Angeles Gas and Electric Corporation.

(b) The disallowance as a deduction from gross income of the sum of \$18.45, constituting a loss by casualty sustained by the petitioner.

(a) The inclusion of \$8,394.92 in taxable income.

(1) From June 1, 1920, to January 31, 1937, inclusive, the petitioner was employed as an attorney at law in the Legal Department of Los Angeles Gas and Electric Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of California. [3]

(2) During such period said Los Angeles Gas and Electric Corporation owned and operated a public utility gas system and also a public utility electric system, which systems respectively served, inter alia, said The City of Los Angeles and its inhabitants with gas and electricity.

(3) Pursuant to an agreement of purchase and sale theretofore made between said Los Angeles Gas and Electric Corporation, as vendor, and The City of Los Angeles, as vendee, said electric system of said Corporation was sold and transferred by said Corporation to The City of Los Angeles at twelve o'clock midnight on January 31, 1937. That said electric system ever since has been, and now is, owned by said The City of Los Angeles, and has been, and now is, under the control and management of the Department of Water and Power, a department of said The City of Los Angeles that, under the Charter of said City, has the power and duty of such control and management.

(4) Coincidentally with the sale and transfer of said electric system by said Los Angeles Gas and Electric Corporation to said The City of Los Angeles, as aforesaid, to wit, on January 31, 1937, the petitioner's said employment by said Los Angeles Gas [4] and Electric Corporation wholly ceased and terminated, and the petitioner was, on January 30, 1937, paid in full for all services by him rendered and to be rendered during the month of January, 1937, pursuant to his contract of em-

ployment with said Los Angeles Gas and Electric Corporation, and had theretofore been paid in full for all services by him rendered or to be rendered by said Los Angeles Gas and Electric Corporation pursuant to his said contract of employment for the period of such employment prior to January 1, 1937.

(5) On or about February 19, 1937, Los Angeles Gas and Electric Corporation paid the petitioner said sum of \$8,394.92, but such payment was made without any consideration whatsoever, either for past services rendered by the petitioner, or for future services to be rendered by petitioner, or otherwise; and the said sum accordingly constituted a mere gift and as such was and is non-taxable income.

(6) In determining said supposed deficiency, the respondent ruled that such gift constituted taxable income for the calendar year 1937, upon the ground that the payment thereof had been claimed by said Los Angeles Gas and Electric Corporation as an operating expense, to wit, additional compensation for past [5] services rendered to said Corporation by the petitioner.

(7) The ruling of the respondent last aforesaid was and is erroneous and contrary to the decision of the Supreme Court of the United States in the case of *Bogardus v. Commissioner of Internal Revenue*, 302 U. S. 34; 82 L. Ed. 32 (decided November 8, 1937).

(b) The disallowance of \$18.45 as a deduction from gross income.

(1) During the year 1937, shortly prior to November 15th, the petitioner accidentally broke a pair of eyeglasses with their frame, upon the use of which the petitioner was and is continuously dependent.

(2) Thereafter on November 15, 1937, said eyeglasses were replaced by the petitioner at a cost to him then paid of \$18.45.

(3) The petitioner has been unable to ascertain either the date of the acquisition by him of the glasses so broken or the cost of the same, but that according to his best recollection the date of such acquisition was within a year or two prior to said November 15, 1937, and said cost was slightly in excess of said sum of \$18.45.

(4) In determining said supposed deficiency, the respondent disallowed the said sum of \$18.45 claimed [6] by the petitioner as a deduction from gross income in the year 1937, upon the grounds (a) that the same did not and does not constitute a deduction within the meaning of Section 23(e) of the Revenue Act of 1936; and (b) that such claim deduction had not and has not been substantiated, nor has the amount of the alleged loss been established.

Wherefore, the petitioner prays that this Board may hear the proceeding and, by its determination therein,—

(a) Exclude from taxable income of the petitioner, for the calendar year 1937, the said sum of

\$8,394.92 as constituting a gift in said year, received by the petitioner from said Los Angeles Gas and Electric Corporation, as aforesaid;

(b) Allow as a deduction from gross income of the petitioner, for the calendar year 1937, the said sum of \$18.45 as constituting a loss by casualty sustained by the petitioner.

SAMUEL POORMAN, JR.

Petitioner, in propria persona,
P. O. Box 240, Arcade Annex,
Los Angeles, California. [7]

State of California,
County of Los Angeles—ss.

Samuel Poorman, Jr., being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

SAMUEL POORMAN, JR.

Subscribed and sworn to before me, this 21 day of May, 1940.

(Seal) EVERARD L. McMURRIN
Notary Public in and for the County of Los Angeles,
State of California. [8]

“EXHIBIT A”

Treasury Department
Internal Revenue Service
12th Floor,
U. S. Post Office and Court House,
Los Angeles, California.

Mar. 27, 1940

Office of
Internal Revenue Agent in Charge
Los Angeles Division

IT:LA
PAK-90D

Mr. Samuel Poorman, Jr.,
207 South Broadway,
Los Angeles, California.

Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1937 discloses a deficiency of \$708.92 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to Internal Revenue agent in Charge, Los Angeles, California, for the attention of IT:LA:FC. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlied.

Respectfully,

GUY T. HELVERING,

Commissioner,

By R. B. SULLIVAN,

Internal Revenue Agent

Enclosures:

Statement.

Form of waiver. [9]

STATEMENT

Mr. Samuel Poorman, Jr.

207 South Broadway,

Los Angeles, California.

Tax Liability for the Taxable Year Ended

December 31, 1937

Income tax—

Liability—\$816.97

Assessed—\$108.05

Deficiency—\$708.92

In making this determination of your income tax liability, careful consideration has been given to

the report of examination dated September 11, 1939; to your protest dated September 19, 1939; and to the statements made at the conferences held on November 9, 1939 and February 5, 1940.

Adjustments to Net Income

Net income as disclosed by return.....		\$ 4,801.23
Additional income and unallowable deductions:		
(a) Additional compensation	\$8,394.92	
(b) Loss by casualty.....	18.45	8,413.37
	<hr/>	<hr/>
Net income adjusted.....		\$13,214.60

Explanation of Adjustments

(a) The amount of \$8,394.92 paid to you by the Los Angeles Gas and Electric Corporation in 1937 has been included in your gross income for the calendar year 1937 pursuant to the provisions of section 22(a) of the Revenue Act of 1936.

(b) The amount of \$18.45 which you claimed as a deduction in the year 1937 through the accidental breakage of your eyeglasses has been disallowed as not constituting a deduction within the meaning of section 23(e) of the Revenue Act of 1936, and for the further reasons that such claimed deduction has not been substantiated nor has the amount of the alleged loss been established.

The earned income credit has been increased to \$965.94 in accordance with section 25(a)(3) of the Revenue Act of 1936. [10]

Computation of Tax

Net income adjusted.....		\$13,214.60
Less: Personal exemption	\$1,000.00	
Credit for dependents.....	800.00	1,800.00
		<hr/>
Balance (surtax net income).....		\$11,414.60
Less: Earned income credit.....		965.94
		<hr/>
Net income subject to normal tax.....		\$10,448.66
Normal tax at 4% on \$10,448.66.....	\$417.95	
Surtax on \$11,414.60.....	399.02	
		<hr/>
Correct income tax liability.....		\$816.97
Income tax assessed:		
Original, account #820708.....		108.05
		<hr/>
Deficiency of income tax.....		\$708.92

[Endorsed]: U. S. B. T. A. Filed May 27, 1940.

[11]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I, II, III.

Admits the allegations contained in paragraphs I, II and III of the petition.

IV(a)(b)

Denies the Commissioner erred as alleged in subdivisions (a) and (b) of paragraph IV of the petition.

Reference is made to subdivisions (a) (1) to (7), inclusive, of Paragraph IV of the petition. Respondent admits that during part of the year 1937 the petitioner was employed as an attorney in the legal department of the Los Angeles Gas and Electric Corporation which owned and operated a public utility gas and *and* electric system in Los Angeles, California; and further admits that on or about January 1, 1937, the petitioner received from said [12] corporation a certain sum, the amount of which is not known to this respondent, as fees, salary and compensation for services rendered prior to that date, but denies that such payment, or payments, was in full satisfaction for all services theretofore rendered by the petitioner to the said gas and electric corporation.

Respondent denies each and every other allegation contained in subdivisions (a) (1) to (7), inclusive, of said petition, and specifically denies that the amount of \$8,394.92 received by the petitioner in February, 1937, and any other amounts received by the petitioner from said Los Angeles Gas and Electric Corporation on and after the first day of January, 1937, was a gift to petitioner from said corporation.

Reference is made to subdivisions (b) (1) to (4), inclusive, of paragraph IV of the petition. Re-

spondent admits that on or about February 19, 1937, the said petitioner received from the Los Angeles Gas and Electric Corporation a sum not less than \$8,394.92 as additional fees, salary and compensation for services theretofore rendered the said gas and electric corporation. Respondent denies each and every allegation therein contained, except the statements that petitioner claimed as a deductible loss from his 1937 income the amount of \$18.45 on account of the loss of eyeglasses through casualty and that the respondent disallowed said claim.

V.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied. [13]

Wherefore, it is prayed that the determination of the Commissioner be approved.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

FRANK T. HORNER,

B. M. COON,

Special Attorneys,

Bureau of Internal Revenue.

BMC/c 7-16-40

[Endorsed]: U. S. B. T. A. Filed Jul. 22, 1940.

[14]

[Title of Board and Cause.]

Under the evidence it is *held* that the payment of a substantial sum to the petitioner by his former employer constituted additional income rather than a gift. *Bogardus v. Commissioner*, 302 U. S. 34, distinguished.

Samuel Poorman, Jr., Esq., pro se.

Byron M. Coon, Esq., for the respondent.

This proceeding involves a deficiency in income tax for the calendar year 1937 in the amount of \$708.92. The issue is, Did the respondent err in including in petitioner's gross income \$8,394.92 received by him from his former employer under the circumstances hereinafter set out?

FINDINGS OF FACT.

Petitioner is a resident of Los Angeles, California. He filed his income tax return for the year 1937 on the basis of cash receipts and disbursements with the collector of internal revenue for the sixth district of California.

Petitioner is an attorney at law, employed by the city of Los Angeles and assigned to duty with the department of water and power. For a period of approximately 17 years preceding January 31, 1937, petitioner had been employed in the legal department of the Los Angeles Gas & Electric Corporation. For approximately 10 years prior to the termination of petitioner's employment by this corpora-

tion he had been exclusively engaged in defending and working upon litigation which had been instituted by the city of Los Angeles and by the city of Pasadena against it. The general purpose of the litigation was to enjoin the corporation from using the cities' streets for the distribution of gas and electricity or for any purpose other than lighting.

During 1935 negotiations were begun looking to the sale of the electric properties of the corporation. This culminated in the execution of a final agreement in October 1936, under which such properties were sold [15] to the city as of January 31, 1937, for approximately \$46,000,000. In connection with the sale approximately 840 employees of the corporation, chiefly those who had been engaged in the operation of the electric properties, were transferred to the department of water and power of the city of Los Angeles. Petitioner was one of those transferred, although he did not enter the employ of the city department until March 1, 1937. The transferred employees constituted about one-third of the personnel of the corporation. After the sale of the electric properties the corporation engaged solely in the gas business. In May 1937 it was merged with the Southern California Gas Co.

On May 30, 1937, petitioner, whose salary from 1929 forward had been \$1,000 a month, was paid in full by the Los Angeles Gas & Electric Corporation for all services rendered and to be rendered by him during the month of January 1937. He had there-

tofore been paid in full by the corporation for all services rendered by him prior to January 1, 1937. Attached to the check by which such payment for services for January 1937 was made, was a voucher containing the following statement:

Statement of Account. In full settlement of which payee has accepted Los Angeles Gas & Electric Corporation check, annexed hereto: Samuel Poorman, Jr., January 30, 1937, services as attorney during the month of January, 1937,—\$1,000.00. Payee will detach and retain this statement.

In September of 1932 the corporation and several other public utility companies in southern California established a "Uniform Pension and Benefit Plan" for their employees. A booklet was printed explaining the details of the plan, which in general provided: That each employee should contribute by pay roll deduction each month 3 percent of his current wages, to be "used solely to provide a portion of his total retirement income." The company was to pay the entire balance of the net cost of the employees' retirement income and in addition provide and administer at its own expense the death and disability benefits. The printed announcement states: "The companies believe in this plan so firmly that their contract with the insurance company provides that the companies' contributions, once made to these funds, must be used for employee benefit only and not diverted to any other purpose. In other

words, the companies' payments, as well as the employees' deposits, are dedicated solely to the cause of employee benefit."

All employees who had completed two or more years of continuous service prior to September 1932 were eligible to participate in the plan. Employees completing 10 or more years of continuous service prior to normal retirement date (65 for men and 60 for women) were entitled to receive a monthly pension of \$1 per month for each \$1,000 of wages earned during continuous service subsequent to September 1, 1930, the [16] minimum pension for those who completed 20 or more years of continuous service at normal retirement date being \$45 per month. Such pension payments were to commence on the last day of the month following retirement and continue during the life of the employee. Each employee's contribution under the plan was to be paid over to the insurance company and used to provide a portion of his retirement income. The amount was returnable to the employee in cash if he should leave the employ of the company or to his beneficiaries in cash if he should die prior to reaching retirement age.

The company obligated itself to pay the entire balance of the net cost of the employee's retirement income and in addition to provide and administer at its own expense the death and disability benefits. The death benefit was to be an amount equal to one year's wages, with a minimum of \$2,000

for full-time employees. The disability benefits were to be "3 percent per month of the total death benefit in effect at the date the disabled employee leaves work on account of disability", payments at this rate to continue for 12 months. For the next 48 months payments were to be made at the rate of $2\frac{1}{2}$ percent per month of the total death benefit. The maximum monthly disability benefit was not to exceed 50 percent of the monthly salary in effect at the date the employee should leave work on account of disability. The disability payments were to be "inclusive of any disability payments made pursuant to the Workmen's Compensation, Insurance and Safety laws of the State of California, and/or any laws of said State providing disability compensation." For employees who would have completed 20 or more years of continuous service at normal retirement date, the minimum disability benefit or disability retirement income was to be \$45 per month, and employee contributions were to cease during the period of disability. If an employee withdrew or was released from service prior to normal retirement age, he had the option of converting his death benefit into any of the regular life insurance policies issued by the insurance company, except term insurance, at the rate applicable to his then attained age and class of risk. Such conversion could be effected without medical examination, provided application be made within 31 days after termination of service. The company reserved the right to discontinue or change the plan at any

time. "Discontinuance or change, however, will neither deprive any employee of any right with respect to his contributions nor affect retirement annuities which have been purchased prior to the date of discontinuance or change. The Companies' contributions, once made, will be used for employees' benefits and for no other purpose."

When it became obvious that the sale would be consummated and a substantial number of the corporation's employees would be transferred, serious consideration was given by the corporation's officers [17] to the effect of the transfer upon the rights of the employees under the "Uniform Pension and Benefit Plan." It was recognized that the employees were losing various rights in leaving the service of the corporation and that "severance of employment meant sacrifice of pension rights." The officers wanted to do something for the employees who were to be transferred "in consideration of the fact that they were going to lose their pension rights by termination of service." They first considered the possibility of obtaining from the insurance company which had underwritten the plan some sort of continuing benefit under it. The representatives of the insurance company told them this would be impossible, and that they "had just better forget any such thing as that, and do directly for the departing employees whatever the company could and desired to do." After much discussion and study, the corporation decided in the latter part of November or early in December 1936 to make a payment

to each of the transferred employees based upon his or her age, length of service with the company, and wages received during period of employment. The "tax angle" was taken into consideration also, and it was decided to make the payment in such a manner that it would be a proper deductible expense of the corporation in computing the net profit from the sale. Careful consideration was given to the language describing the payments in the checks to be issued and in letters to be sent to the transferred employees. It was decided that the words "additional compensation" would accurately describe the payments "inasmuch as the extra compensation was based on the length of past service, that is, service prior to January 31, 1937, [and] upon the rate of the pay received by the employee during all that period."

On or about January 25, 1937, the Los Angeles Gas & Electric Corporation sent two letters to each of the employees to be transferred. One, dated January 25, 1937, signed by its president and general manager, was addressed: "To Employees about to be transferred from the service of our Company:". It contained the following statement:

Arrangements have been made to grant you additional compensation in recognition of the value of your past services. The amount of this payment will be based upon your present attained age, your length of service with the Company, and the rates of wages received during

your period of employment; but this extra compensation will not be paid to employees whose "employment date" is more recent than September 1, 1934. Checks will be mailed to you as soon as possible after our electric properties have passed to the City.

The other letter dated, January 1937, was addressed "To Members of Uniform Pension and Benefit Plan Who Will Transfer to the Service of the City of Los Angeles concurrently with the Transfer of Our Electric System to the City:" and informed them that their membership in the uniform pension and benefit plan would cease with [18] the termination of their service; that their life insurance protection under the plan would continue for 31 days after termination of service; and that a check would be sent covering the amount of their contributions to the plan, together with interest thereon.

Petitioner received these two letters sometime after January 25, 1937. On that date he was notified by the president of the Los Angeles Gas & Electric Corporation that his work with the corporation was finished and that he was to be transferred to the department of water and power of the city of Los Angeles. In the course of this conversation, the president of the corporation stated that the Pacific Lighting Corporation had arranged for the giving of a bonus to the employees who were to be transferred to the city department. The Pacific Lighting Corporation was the holding company of which the

Los Angeles Gas & Electric Corporation was the principal subsidiary. The holding company owned all of the common stock of such subsidiary, and completely dominated the management and control of it. At all times during the petitioner's employment by the subsidiary its earnings sufficed to cover several times its preferred stock dividends.

On or about February 19, 1937, the petitioner received from the Los Angeles Gas & Electric Corporation a check for \$8,394.92, to which was attached a voucher reading as follows:

Additional compensation for services to and including January 31, 1937, in accordance with the President's letter of January 25, 1937. No. 26, Total amount, \$8,491.34. Deductions, Federal O. A. B., \$20. State, U. I., \$76.42. Net amount, \$8,394.92 This statement constitutes a valuable record of your earnings and the contributions you have made toward future social security benefits We recommend that you keep it for your *further* reference. Los Angeles Gas & Electric Corporation, detachable for presenting for payment.

The payments made by the Los Angeles Gas & Electric Corporation to the employees transferred to the department of water and power of the city of Los Angeles, in accordance with the letter of January 25, 1937, aggregated \$475,546.32, and were charged to a ledger account designated "Sale of Electric Properties, Suspense Account." This ac-

count showed in black entries the total expenses in connection with the sale of the properties, and in red ink figures the amount received from the city for them, together with any other credits necessary in order to arrive at the net profit. On the books of the corporation the payments of \$475,546.32 were treated as an expense incurred in connection with the sale of the electric properties. In the corporation's income tax return for 1937 these payments were treated in the same manner and were deducted from the amount received from the city in computing the net profit realized from the sale of the electric properties.

No bonus or additional compensation whatsoever was paid to the employees retained by the Los Angeles Gas & Electric Corporation, [19] and no extra payment other than the one here in question was ever made by the corporation to the petitioner.

The petitioner had nothing to do with the sale of the electric properties, nor did any other employee of the corporation who was transferred to the department of water and power and to whom the so-called additional compensation was paid.

In petitioner's individual income tax return for the calendar year 1937, the amount of \$8,394.92 was reported in a schedule as nontaxable income other than interest. The following explanation was given: "Bonus received from Los Angeles Gas & Electric Corporation after leaving its employ upon transfer of its electric system to The City of Los Angeles,

(not having been paid or received as a consideration for services rendered, and the same constituting a gift, as held in *Bogardus v. Commissioner of Internal Revenue* [302 U. S. 34], 82 L. Ed. 90); * * * \$8,394.92.”

Respondent determined that the \$8,394.92 was additional compensation and added this amount to the net income shown in petitioner's income tax return for 1937.

OPINION.

Mellott: Petitioner, in support of his contention that the \$8,394.92 was a gift, relies principally upon *Bogardus v. Commissioner*, 302 U. S. 34. In that case, the taxpayer, prior to 1931, had been in the employ of the Universal Oil Products Co., the business and assets of which had greatly increased between 1922 and 1930. Early in 1931, its entire stock was sold to the United Gasoline Corporation for \$25,000,000. Prior to the sale, and in contemplation of it, the Unopco Corporation had been organized for the purpose of acquiring, and it did acquire, certain assets of the Universal Co. of the value of over \$4,000,000. All of the former stockholders of the latter company became stockholders of Unopco, with the same proportionate holdings. None of them, after the sale of the Universal stock, held any stock in the Universal Co. or in the United Gasoline Corporation. Under its new ownership, the Universal Co. continued to carry on the same business, retaining a large part of its assets. A few days after the

sale of the Universal Co.'s stock, the former stockholders, then stockholders of the Unopco Co., held a meeting at which it was proposed that they show their appreciation of the loyalty and support of some of the employees of the Universal Co. by making them a "gift or honorarium." At meetings of the board of directors and stockholders of Unopco resolutions were adopted that \$607,500 be appropriated, paid, and distributed as a bonus to 64 former and present employees of the Universal Co., in recognition of their valuable and loyal services. Bogardus continued to remain in the employ of the Uni- [20] versal Co. after the change of the ownership of its stock, and when the distribution was made by Unopco in 1931 he received \$10,000. The Supreme Court held that this payment was a gift and not additional compensation.

There are several differences between the facts in the Bogardus case and those presently before us. "The recipients of the bounty * * * were never employees of the Unopco Company, or any of its stockholders." Petitioner and the other employees who received the payments from the corporation had been in its employ until the sale of the properties to the city. "Neither the Universal Company nor any one else was under any obligation, legal or otherwise, to pay any of the recipients, including petitioner, any salary, compensation, or consideration of any kind." The Los Angeles Gas & Electric Corporation, however, was at least under a moral obliga-

tion to the employees whose services were being terminated through no fault of theirs. It had agreed with them "to provide and administer, at its own expense, the death and disability benefits" and to pay a portion of the net cost of securing a "retirement income." Though the record does not disclose the exact amount which the company had contributed and which "once made, * * * [was to] be used for employees' benefits and for no other purpose", it must have been a considerable amount. Petitioner's rights, for example, seem to have been to receive "retirement income" of at least \$76 per month, insurance of at least \$12,000, and disability benefits of \$360 per month for 12 months and \$300 per month for an additional 48 months. "It was recognized", said the vice president of the company and chairman of the benefit committee, "that in accordance with the terms of the pension plan, severance of employment meant sacrifice of pension rights except, I would say not only pension rights, but all rights under the pension benefit plan, with the exception that the life insurance in accordance with the regular provisions always continued for 31 days after termination of service. It was recognized that the employees were losing various rights in leaving the service of the corporation." For this reason "consideration commenced among the company officials as to what, if anything, could be done for the employees who were transferred to the city with the property * * * in consideration of the fact that they

were going to lose their pension rights by termination of service." "Finally, after much discussion and study of the situation, the plan which was ultimately followed was worked out and a basis of compensation, additional compensation for past services, was formulated which, as stated in the President's letter, was in consideration of past valuable services and was based upon the present attained age of the employees, their length of service [21] with the company, and the rates of wages which they had received during their period of employment."

In the Bogardus case the payments were charged "not to expense but to surplus." In the instant proceeding the payments were charged to expenses in connection with the sale of the properties. Here again the record is not very clear; but inferentially it seems that the charge could properly have been so classified only if it had been necessary for the corporation to make the payments either to fulfill an obligation (even "a moral obligation, however slight", *Bogardus v. Commissioner*, *supra*), or to regain possession of some of the money which had been put up with the understanding it would "be used for employees' benefits and for no other purpose." It is also not without significance that the payments in the instant proceeding were designated by the corporation "additional compensation" while those in the Bogardus case were referred to as part of a "gift or honorarium" to the employees. True, calling a payment a gift, bonus, honorarium, additional compensation, or anything else does not

change, or establish, its true characteristic; but it is at least a circumstance to be considered in determining the intention of the parties. "Intention" said the Court in the *Bogardus* case, "must govern." The Court was referring to the intention of the one making the payment. The Circuit Court of Appeals for the Ninth Circuit indicated in *Botchford v. Commissioner*, 81 Fed. (2d) 914, that it felt that the intention of the employer was particularly important—a view evidently shared by other Circuit Courts, *Fisher v. Commissioner*, 59 Fed. (2d) 192; *Walker v. Commissioner*, 88 Fed. (2d) 61; *Levey v. Helvering*, 68 Fed. (2d) 401; *Bass v. Hawley*, 62 Fed. (2d) 721, and also by this Board. Cf. e. g. *N. H. Van Sicklen, Jr.*, 33 B. T. A. 544. Then, too, as the court pointed out in *Botchford v. Commissioner*, *supra*, as a general rule directors of a corporation have no power or authority to give away any of its assets, cf. *Noel v. Parrott*, 15 Fed. (2d) 669; certiorari denied, 273 U. S. 754; and "if the directors could not give away this sum, and the books of the corporation show that it was not given away, it must be presumed that the payment was not a gift."

Whether the payment to this petitioner was, or was not, a gift is a mixed question of law and fact. Respondent determined that it was not a gift. Petitioner, undertaking to overcome the presumption attaching to this determination, *Botany Worsted Mills v. United States*, 278 U. S. 282, has shown and it has been found as a fact that he, previous to the receipt of the sum in issue, had received all of

his agreed salary. He argues that the additional payment not only was not "additional" compensation, but that it could not even be "compensation", since he had already been compensated in full. [22] In *Botchford v. Commissioner*, *supra*, the court quoted with approval the following language used by the Circuit Court of Appeals for the Second Circuit in *Fisher v. Commissioner*, *supra*:

The doctrine that bonus payments and gratuitous "additional compensation" for past services may constitute taxable income has been frequently recognized in decisions of the lower Federal courts and of the Board of Tax Appeals.

We do not interpret the *Bogardus* case as laying down any different principle. Cf. *Georgia S. Williams*, 36 B. T. A. 974.

Petitioner also contends that, since the corporation saw fit to enter the payment made to him and to the other employees upon its books as an expense item in connection with the sale of its electric properties, and since the evidence shows that they, and especially he, had nothing to do with making such sale, it follows that the corporation erred in characterizing the payment as additional compensation. There would be more substance to this contention if the respondent were required to prove that the payment was made in consideration of, and as compensation for, services rendered by petitioner in that particular transaction. But he had no such burden.

He may rest upon the presumption of correctness attaching to his determination that the payment was not a gift, *Botany Worsted Mills v. United States*, *supra*; *Reinecke v. Spalding*, 280 U. S. 227; and petitioner must prove that this determination was erroneous. He has not sustained his burden merely by proving—if in fact he has proved—that it was improperly treated upon the books of the corporation. In other words, it was incumbent upon petitioner to prove that the corporation was not discharging some obligation to him by making the payment in question. The evidence indicates that the payments were made to compensate the employees for the loss of their rights under the “Uniform Pension and Benefit Plan” or to enable the company to withdraw the funds which had been put up with the insurance company in connection with such plan. This, in our opinion, was sufficient consideration to prevent the payments being absolute gifts. We therefore hold that the respondent committed no error in including the amount received by this petitioner in his gross income.

The only other error charged in the petition is the disallowance by the respondent of a deduction of \$18.45. This is not discussed upon brief. The petition alleges that petitioner accidentally broke a pair of eyeglasses with their frame and replaced them during the taxable year at a cost of \$18.45; that he had been unable to ascertain either the date of the acquisition of the glasses so broken or their cost; and

that according to his best recollection the date of acquisition was within a year or two prior to their replacement, the cost being in excess of \$18.45.

At the hearing petitioner admitted he did not have any "very satisfactory proof" that he had sustained a loss through casualty. (Sec. [23] 23 (e) (3), Revenue Act of 1936.) He testified that he had paid \$3 of the \$18.45 to a doctor for examination of his eyes, \$15 for new glasses, and 45 cents as state tax. This was the sole evidence offered. The claim for the deduction has probably been abandoned; but, if not, this issue must be resolved against petitioner for failure of proof.

Decision will be entered for the respondent. [24]

United States Board of Tax Appeals

Washington

Docket No. 102994

SAMUEL POORMAN, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Findings of Fact and Opinion promulgated September 12, 1941, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1937 in the amount of \$708.92.

Enter:

Entered Sept. 16, 1941.

(Seal)

ARTHUR J. MELLOTT,
Member. [25]

[Title of Board and Cause.]

PETITION OF SAMUEL POORMAN, JR. FOR
REVIEW, BY THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT, OF DECISION OF THE
UNITED STATES BOARD OF TAX AP-
PEALS

Samuel Poorman, Jr., the Petitioner in this cause, appearing herein pro se, hereby files his Petition for a Review, by the United States Circuit Court of Appeals of the Ninth Circuit, of the decision of the United States Board of Tax Appeals entered herein on September 16, 1941, ordering and deciding that there is a deficiency in United States individual income tax due from Petitioner for the calendar (and taxable) year 1937 in the amount of \$708.92; and in that behalf Petitioner respectfully shows:

I.

Petitioner is an individual and a citizen of the United States with residence at No. 1256 West 7th

Street, in The City of Los Angeles, State of California. The United States individual income tax return of Petitioner for the calendar year 1937, in respect of which the aforementioned [26] deficiency has been so determined to have arisen, was duly filed by Petitioner within the time provided therefor with the Collector of Internal Revenue for the Los Angeles Division, 6th District of California, at The City of Los Angeles, State of California, located within the judicial circuit of appeals for the Ninth Circuit.

II.

Nature of the Controversy

The tax in controversy is United States individual income tax for the calendar year 1937 in the principal amount of \$708.92 (less the portion of said amount assessed and/or assessable by reason of the inclusion in Petitioner's taxable income of the sum of \$18.45, for the deduction of which from gross income Petitioner's claim has been abandoned), and such controversy involves the proper determination of Petitioner's liability for such income tax.

Said decision of said Board that there is such deficiency in income tax in the aforesaid amount in controversy is based upon its determination (as set forth in its Findings of Fact and Opinion reported in 45 Board of Tax Appeals Reports, No. 15), that the sum of \$8,394.92, paid to the Petitioner during said year by Los Angeles Gas and Electric Corporation, constituted additional compensation for past

services rendered by Petitioner to said Corporation and was not an absolute gift. [27]

III.

Petitioner, being aggrieved by the said decision of said Board and its said Findings of Fact and Opinion, desires to obtain a review thereof by the United States Circuit Court of Appeals of the Ninth Circuit.

IV.

Assignment of Errors

As the basis of this Petition for Review, Petitioner assigns as error the following acts and omissions of said Board in making its said determination and decision, to wit:

(1) Said Board erred in finding and determining that said sum of \$8,394.92 constituted additional compensation paid to Petitioner by said Los Angeles Gas and Electric Corporation, his former employer, for past services by him rendered to such former employer, and in determining that said sum constituted taxable income of Petitioner for said year 1937;

(2) Said Board erred in failing to find and determine that such payment was a gift to Petitioner and to determine the same to be non-taxable income of Petitioner for said year 1937;

(3) Said Board erred in finding and determining that there was or is a deficiency in said income tax due from Petitioner for said year 1937 by rea-

son of said payment to him of said sum of \$8,394.92; and

(4) Said Board erred in failing to find and determine that there was and is no deficiency in income tax due from [28] Petitioner for said year 1937 by reason of said payment to him of said sum of \$8,394.92.

Wherefore, your Petitioner prays that the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit may review, and reverse and set aside, said decision and order of the United States Board of Tax Appeals insofar as the same relate to said payment to Petitioner of said sum of \$8,394.92 and to any deficiency in income tax due from Petitioner based thereon, and direct said Board to make its decision and order that there is no such deficiency; and that said Court make and enter such further order and direction as may be meet and proper in the premises.

SAMUEL POORMAN, JR.

Petitioner Pro Se

State of California,
County of Los Angeles—ss.

Samuel Poorman, Jr., being first duly sworn, deposes and says: I am the Petitioner in the above-entitled proceeding. I prepared the foregoing Petition and am familiar with the contents thereof, and the allegations of fact contained therein are true to the best of my knowledge, information and belief.

This Petition is not filed for the purpose of [29] delay and I believe that, as such Petitioner, I am justly entitled to the relief sought.

SAMUEL POORMAN, JR.

Subscribed and sworn to before me this 28th day of November, 1941.

(Seal)

E. L. McMURRIN

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: U. S. B. T. A. Filed Dec. 5, 1941.

[30]

[Title of Board and Cause.]

NOTICE OF FILING

To Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., and to Chief Counsel of the Bureau of Internal Revenue, Attorney for Respondent, Internal Revenue Building, Washington, D. C.:

You are hereby notified that on the 1st day of December, 1941, a Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals, heretofore entered in the above-entitled cause, was deposited in the post-office at The City of Los Angeles in a sealed envelope, with the postage thereon fully prepaid, addressed as follows: "United States Board of Tax Appeals, Washington, D. C.", and that with said

Petition was enclosed a request that the same be filed with said Board. A copy of said Petition is attached hereto and served upon you.

Dated at Los Angeles, California, this 1st day of December, 1941.

SAMUEL POORMAN, JR.

Petitioner Pro Se.

[Endorsed]: U. S. B. T. A. Filed Dec. 5, 1941.

[31]

[Title of Board and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,
County of Los Angeles—ss.

Frantz B. Lilloe, being duly sworn, deposes and says: That he is a citizen of the United States and a resident of The City of Los Angeles, County of Los Angeles, State of California, over the age of 18 years and not a party to the above-entitled proceeding; that on the 1st day of December, 1941, affiant served the within Petition for Review, and also the within Notice of Filing of said Petition, on J. P. Wenchel, Esq., the attorney of record for Respondent therein, by depositing a true copy of each thereof in the postoffice at said City of Los Angeles in a sealed envelope, with the postage thereon fully prepaid, addressed as follows: "J. L. Wenchel, Esq., Chief Counsel, Bureau of Internal

Revenue, Internal Revenue Building, Washington, D. C.", said address being the true address of the party served and the place whereat he has his office. [32]

That the Petitioner in said proceeding resides and has his office in said City of Los Angeles, and that there is a regular communication by mail between such place of mailing and the place to which such envelope was so addressed.

FRANTZ B. LILLOE

Subscribed and sworn to before me this 1st day of December, 1941.

(Seal)

E. L. McMURRIN

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: U. S. B. T. A. Filed Dec. 5, 1941.

[33]

[Title of Board and Cause.]

STATEMENT OF EVIDENCE

The above-entitled cause was heard before the United States Board of Tax Appeals at Los Angeles, California, on February 18, 1941, Hon. Arthur J. Mellott presiding. The following is a statement of the evidence introduced at such hearing.

SAMUEL POORMAN, JR.,

the Petitioner, as a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination

I am the Petitioner, an attorney at law, now Assistant City Attorney of Los Angeles assigned to duty with the Department of Water and Power of the City. For some seventeen years, ending January 31, 1937, I was employed as an attorney in the Legal Department of Los Angeles Gas and Electric Corporation. On that date was consummated a sale to the City of the electric properties of said Corporation, and thereupon some 840 employees of the Corporation were transferred to the City's Department of Water and Power,—myself amongst them, although I did not enter the [34] Department's employ until March 1, 1937.

I had been carrying on the Corporation's franchise litigation against the City for some eight years prior thereto. On January 25, 1937, A. B. Day, then President of the Corporation, called me into his office and told me that my work with it was finished, and that Mr. Robinson, attorney for said Department, who had been my opponent in the franchise cases that had been brought by the City, two in number, had asked if there was anybody to be transferred from the legal department to the Department of Water and Power, that I should be transferred. Mr. Day then said that Pacific Lighting Corporation, which held all of the common stock of Los Angeles Gas and Electric Corporation, had

(Testimony of Samuel Poorman, Jr.)

arranged for the giving of a bonus to the employees transferred to the Department and he advised me what the payment to myself would be. He made no mention of the payment being additional compensation, but he did say that it was in recognition of my fine work in the franchise cases.

On January 30, 1937, I received from Los Angeles Gas and Electric Corporation my last salary check from them, which was at the rate I had enjoyed since 1929, to wit, \$1,000.00 a month. To the check was attached a voucher reading:

“Statement of Account. In full settlement of which Payee has accepted Los Angeles Gas and Electric Corporation check annexed hereto. Samuel Poorman, Jr., January 30, 1937. Services as attorney during month of January, 1937, . . . \$1,000.00. Payee will please detach and retain this statement.” [35]

On February 19, 1937, I received from Los Angeles Gas and Electric Corporation their check payable to me for \$8,394.92, which check I deposited in my account with the Security First National Bank on February 19, 1937. Attached to the check was the following voucher:

“Additional compensation for services to and including January 31, 1937, in accordance with the President’s letter of January 25, 1937. No. 26. Total Amount, \$8,491.34. Deductions, Federal O.A.B. \$20.00. State U. I., \$76.42 Net

(Testimony of Samuel Poorman, Jr.)

Amount, \$8,394.92. This statement constitutes a valuable record of your earnings and the contributions you have made toward future social security benefits. We recommend that you keep it for your future reference. Los Angeles Gas and Electric Corporation. Detach before presenting for payment." (Petitioner's Exhibit 2)

I received Mr. Day's letter (Petitioner's Exhibit 3), referred to in the voucher check, subsequent to my conversation with him. My recollection is that it was after I had left the employ of the Corporation and about the same time that I received a letter dated simply January, 1937, addressed by the Secretary of the Benefit Committee "To members of Uniform Pension and Benefit Plan, who will transfer to the service of The City of Los Angeles concurrently with the transfer of our Electric System to the City," relative to the refund of my contributions to such Plan. (Petitioner's Exhibit 4) Petitioner's Exhibit 3 was the first intimation that I had from any officer of the Company that the payment that had been promised me of \$8,400.00 plus was to be regarded as further compensation, in so many words; but I repeat that when I was told by Mr. Day that Pacific Lighting Corporation had arranged to give a bonus to the departing employees, Mr. Day, said so [36] far as I was con-

(Testimony of Samuel Poorman, Jr.)

cerned, it was in recognition of my fine service in the franchise cases.

Los Angeles Gas and Electric Corporation made a "Severance Report" to the State authorities, a copy of which I received, stating that wages paid me subsequent to January 1, 1936, aggregated \$13,000.00 (Petitioner's Exhibit 5). The Uniform Pension Plan, so far as communicated to the Corporation's employees, was set forth in a pamphlet dated September 1, 1932, of which I received a copy. (Petitioner's Exhibit 6)

In Schedule H, attached to my income tax return for 1937, being the non-taxable income other than interest reported in Schedule B, I reported said payment of \$8,394.92 with the following statement:

"Bonus received from Los Angeles Gas & Electric Corporation after leaving its employ upon transfer of its electric system to the City of Los Angeles, (not having been paid or received as a consideration for service rendered and the same constituting a gift, as held in *Bogardus v. Commissioner of Internal Revenue*, U. S., 82 Lawyers' Edition 90)."

Los Angeles Gas and Electric Corporation was the principal subsidiary of Pacific Lighting Corporation, which owned all of its common capital stock, and the Board of Directors of the subsidiary were the nominees in all instances of Pacific Lighting Corporation. So that is what I would have expected

(Testimony of Samuel Poorman, Jr.)

from Mr. Day when he stated to me that the Pacific Lighting Corporation had arranged to pay a bonus or give a bonus to the departing employees. The common stock held by Pacific Lighting Corporation exceeded the issued preferred stock of Los Angeles Gas and Electric Corporation, the management and control of which was completely dominated by the holding company. At no time did [37] the earnings of Los Angeles Gas and Electric Corporation fail to suffice to cover several times the preferred stock dividend.

I never rendered any service for Los Angeles Gas and Electric Corporation that I was not paid for month by month during the entire period of my employment from June 1, 1920 to January 31, 1937, and since the summer or spring of 1929 my compensation was one thousand dollars a month except for a short time during the worst of the depression when I suffered a 10% reduction. There was never any hold-over of payment or compensation from one month to the next. I was always paid in full for my services of the preceding month, and I had no term of employment with them whatever. It was entirely at their will. I never rendered any services to the Department of Water and Power for the so-called bonus that was paid to me by the Los Angeles Gas and Electric Corporation, nor did I promise to enter the employ of that department. There was no strings whatever attached to the payment of the \$8,400.00 plus, and no services that I

(Testimony of Samuel Poorman, Jr.)

rendered after its payment, no services that I rendered especially in the week after I was advised that my employment would end with the month of January 1937. I went about my ordinary affairs which at that time was principally taking care of odds and ends and trying to get them as far in shape as one could before he left an office with which he has been long associated.

The Corporation's employees transferred to the Department of Water and Power on the sale of the former's electric plant constituted about a third of the personnel. None of the two-thirds that remained with the corporation received any such bonus. [38]

Thereupon, Petitioner's Exhibits, 1, 2, 3, 4, 5 and 6, heretofore mentioned, were received in evidence.

Petitioner's Exhibit 3 is as follows:

Los Angeles Gas and Electric Corporation

January 25, 1937

Office of

President and General Manager

To Employees about to be transferred from the
Service of our Company:

You are all familiar with the recent events which have resulted in the sale of our electric properties to the City of Los Angeles, and which will make it necessary that the people who operate these properties sever their rela-

(Testimony of Samuel Poorman, Jr.)

tions with Los Angeles Gas and Electric Corporation.

At this time and just before the transfer is completed, I want to express to you all my very great appreciation of the splendid service you have rendered during the past many years, and of the fine support you have given to me and to our management generally in the conduct of our electric business. I have been very happy indeed because of the good-fellowship and spirit of friendliness which has always existed between us, and regret more than I can tell you the conditions which make it impossible for us to continue working together.

Arrangements have been made to grant you additional compensation in recognition of the value of your past services. The amount of this payment will be based upon your present attained age, your length of service with the Company, and the rates of wages received during your period of employment; but this extra compensation will not be paid to employees whose "employment date" is more recent than September 1, 1934. Checks will be mailed to you as soon as possible after our electric properties have passed to the City.

I believe that those of you who enter the employ of the Bureau of Power and Light will be happy in your new environment, and will do well in that field of endeavor. You have my

(Testimony of Samuel Poorman, Jr.)

every wish for your future and continued success.

Sincerely,

(Signed) ADDISON B. DAY

President and General Manager [39]

Petitioner's Exhibit 4 is as follows:

Los Angeles Gas and Electric Corporation

January 1937

Office of

Personnel Manager

To Members of Uniform Pension and Benefit Plan Who Will Transfer to the Service of the City of Los Angeles concurrently with the Transfer of Our Electric System to the City:

As you undoubtedly are aware, your membership in Uniform Pension and Benefit Plan will cease with the termination of your service with Los Angeles Gas and Electric Corporation. Your life insurance protection under the Plan will continue for 31 days after termination of service.

As soon as possible after the transfer, a check will be sent you covering the item of the refund of your contributions to the Plan, now in the hands of Metropolitan Life Insurance Company, together with interest thereon.

Your attention is called to the section entitled "Employee Options upon Termination,"

(Testimony of Samuel Poorman, Jr.)

to be found on pages 14 and 15 of the "Announcement of Uniform Pension and Benefit Plan." Briefly, you have the right to leave your contributions with Metropolitan Life Insurance Company, instead of withdrawing them, and instead—

(a) receive a monthly income for life (pension), to begin at your normal retirement date, or,

(b) continue your contributions to the Insurance Company direct, to purchase a retirement income or pension, to begin at your normal retirement date.

Also, you can arrange with the Insurance Company to change your life insurance, without medical examination, into some form of life insurance policy issued by that Company.

In case you desire to take advantage of any of these options, you should make your intentions known to the office of the Secretary, Mr. F. E. Seaver, who will give you more detailed instructions as to procedure. In any event, please locate your Pension and Benefit Plan Certificate, immediately, and have it ready to turn in when called for. [40]

Any questions regarding the foregoing matters will be answered cheerfully.

Sincerely,

(Signed) D. L. SCOTT

Secretary Benefit Committee

(Testimony of Samuel Poorman, Jr.)

Petitioner's Exhibit 5, severance report made by Los Angeles Gas and Electric Corporation to State authorities in respect to Samuel Poorman, Jr., Attorney. Under heading: "Submit data subsequent to January 1, 1936", the following is shown: date of severance January 30, 1937; total hours worked 2152; total weeks worked 57; wages paid \$13,000; other remuneration \$8,491.34; total wages paid \$21,491.34; amount of contributions deducted \$139.42.

The following excerpts are taken from pages 14 to 17, inclusive, of Petitioner's Exhibits 6:

"Employee Options Upon Termination

Certificate from Insurance Company—

The Insurance Company will issue to each employee participating in the plan a certificate guaranteeing the return, in the manner herein provided, of the entire amount contributed by the employee with interest at the rate of 3% on contributions which have been in the hands of the Insurance Company for a full 12 months' period, compounded at the end of each completed year of participation in the plan.

Options Upon Withdrawal from Service—

If, prior to normal retirement date, an employee withdraws or is released from service, or does not return to service upon discontinuance of disability payments, his total contributions with interest will be returned to him in cash, but such employee shall have the option to

(Testimony of Samuel Poorman, Jr.)

leave such contributions with the Insurance Company and receive therefrom a monthly income [41] for life from normal retirement date, to the extent provided by such contributions, with interest, or to continue his contributions to the Insurance Company and receive therefrom a monthly income for life from normal retirement date, to the extent provided by such contributions with interest.

Privilege of Converting Death Benefits Upon Withdrawal from Service—

If, prior to normal retirement date, an employee withdraws or is released from service, such employee may at his option convert his death benefit into any of the regular life insurance policies issued by the Insurance Company, term insurance excepted, at the rate applicable to his then attained age and class of risk. Such conversion may be effected without medical examination provided application is made within 31 days after termination of service.

Death—Prior to Retirement—

Upon the death of an employee prior to normal retirement date, his total contributions with interest will be returned to beneficiaries in cash.

Death—After Retirement—

Upon the death of an employee subsequent to normal retirement date, the difference, if

(Testimony of Samuel Poorman, Jr.)

any, between the employee's total contributions, with interest to normal retirement date, and the total pension or disability retirement income the employee has received up to date of death will be returned to beneficiaries in cash.

“General Provisions

In the Event of Change or Discontinuance—

As the result of careful study and preparation, this Company has been able to prepare a plan which it desires and expects to continue indefinitely into the future. * * * Nevertheless, the Company must and does reserve the right to discontinue or change the plan at any time. Discontinuance or change, however, will neither deprive any employee of any right with respect to his contributions nor affect retirement annuities which have been purchased prior to the date of discontinuance or change. The Company's contributions, once made, will be used for employees' benefits and for no other purpose.

Not an Employment Contract—

Neither the action of the Company in adopting this plan nor any action taken by the Benefit Committee in interpreting its provisions or in granting benefits hereunder, shall be construed as giving to any officer, agent or employee of the Company the right to be re-

(Testimony of Samuel Poorman, Jr.)

tained in the service, nor shall any [42] employee, after termination of service, have any rights whatsoever hereunder, enforceable either at law or in equity, except as hereinabove expressly provided under the heading 'Employee Options upon Termination.' "

W. E. HOUGHTON,

called by Respondent as a witness, having been duly sworn, testified as follows:

Direct Examination

I am one of the Vice Presidents of Southern California Gas Company, the successor by merger in May, 1937, to Los Angeles Gas and Electric Corporation. On January 31, 1937, and for a number of years prior thereto, I was a Vice President and Treasurer of the latter corporation, and also Chairman of the Committee administering its Pension and Benefit Plan. The Los Angeles Gas and Electric Corporation transferred its electrical properties to the City of Los Angeles and retained its gas properties. The negotiations which ultimately led to the sale of the electric properties were carried on for at least a year and a half, the final agreement being completed and executed in October, 1936. Mr. Poorman had much to do with that matter, as well as other attorneys. The question whether or not cer-

(Testimony of W. E. Houghton.)

tain employees would be transferred to or taken over by the City did come up quite early in the negotiations, because the condition of the City taking over the employees with the property, was one of the essential factors in the whole deal. In fact the Los Angeles Gas and Electric Company's officers were quite insistent from almost the start that they wouldn't talk seriously of a deal with the City unless the City would take the employees to operate the property taken over, because it would be very difficult for the remaining Gas Department to absorb them and the Company [43] certainly did not want to see them left without occupations. The employees taken over were connected primarily with the Electric Department of the old company, but with certain classes of employees a more or less arbitrary allocation had to be made.

Consideration was given to the possible effect of the transfer of employees upon their so-called pension rights, quite early in the course of the proceedings, because it was recognized that in accordance with the terms of the Pension Plan, severance of employment meant sacrifice of not only pension rights, but all rights under the pension benefit plan, with the exception that the life insurance was continued for 31 days after such severance. It was recognized that the employees were losing various rights in leaving the service of the Corporation. About the middle of 1936, when it looked quite cer-

(Testimony of W. E. Houghton.)

tain that the deal for the sale of the property to the City would ultimately be consummated, consideration commenced among the company officials as to what, if anything, could be done for the employees who were transferred to the City with the property or at the same time as the property, in consideration of the fact that they were going to lose their pension rights by termination of service. Various discussions were held among company officials, principally Mr. Day, the President, Mr. Masser, the Executive Vice President, Mr. Hornby, one of the Vice Presidents of Pacific Lighting Corporation, the Parent Company, and myself, and, in some of the discussions, one or two others. I have in mind particularly Mr. Scott, the personnel manager of the Corporation. The first discussion centered more or less around the possibility of obtaining from the Metropolitan Life Insurance Company, which underwrote [44] the Pension Benefit Plan, some sort of a continuing benefit under the Plan. The plan would have to be seriously amended and it didn't when mentioned to the representatives of the insurance Company meet at all with their favor. In fact they said it was impossible, that we had just better do directly for the departing employees whatever the company could and desired to do. After much discussion, the plan ultimately followed was worked out and a basis of additional compensation for past services was formulated which, as stated in the

(Testimony of W. E. Houghton.)

President's letter, was in consideration of past valuable services and was based upon the present attained age of the employees, their length of service with the company, and the rates of wages which they had received during their period of employment. I think I made the original draft of the proposed letter for Mr. Day to send out and that was revised a number of times and finally resulted in the letter in the form as sent out under date of January 25, 1937 (Petitioner's Exhibit 3).

In a general way I had something to do with the letter identified as Petitioner's Exhibit 4; largely for the reason that the carrying out of the mechanics of this matter of issuing the additional compensation checks was under my supervision, and I knew that this certain letter, the one signed by Mr. Scott, was being prepared. In fact, I think I had a hand in preparing it. And to the best of my recollection, the two letters (Exhibits 3 and 4) were sent out in the same envelope, although I couldn't definitely say that that was the case. I might put it this way: We had a regular mailing list of the employees, and a set of envelopes for sending out such letters as this were always prepared well in advance of the actual date of mailing in order that there be no delay when a thing of this kind is ready to go. [45] The company was particularly anxious—and I know of this of my own knowledge—to have this information, the substance of this letter, reach the employees certainly before they completed their

(Testimony of W. E. Houghton.)

service with the company, because, oh, I should say at least three or four weeks before this letter was sent out we commenced to get inquiries from our employees as to "when is the bonus going to be paid? When is the additional compensation going to be paid?" A thing of that kind soon gets around that something is going to be done. So the company was most anxious that the word get to them definitely as early as was possible; and for that reason, although I can't say that the letter was mailed on Janaury 25th, it is very probable that it was mailed on that date. It was certainly the corporation's intention to have the employees notified before they left its own service. And that is the main reason why I think this letter was mailed either on January 25th or the next day.

Thereupon, there was received in evidence Respondent's Exhibit A, being cancelled check of the Los Angeles Gas and Electric Corporation, dated February 17, 1937, and payable to the order of Samuel Poorman, Jr. \$8,394.92, additional compensation for services to and including January 31, 1937. To this check was attached voucher identified as Petitioner's Exhibit 2.

Thereupon Petitioner admitted that the language on the prior checks was always of the type of language in Petitioner's Exhibit 1: "Services as attorney during the month of January," or whatever date it was, at the rate.

(Testimony of W. E. Houghton.)

Most careful consideration was given to both the language used on the check (Exhibit A) in describing this payment, [46] as well as the language used in the letter sent out by the president (Exhibit 3). The desire was to make the language used as accurately descriptive as possible, and it was felt that the language used did fall in that category inasmuch as the extra compensation was based on the length of past service, that is, service prior to January 31, 1937, upon the rate of the pay received by the employee during all that period, and the desire was that there be no question in the minds of anyone examining the books and records that the payments were additional compensation rather than of any other nature. That phraseology or similar phraseology runs through all of the record with references to these payments.

The main purpose in sending the second letters (Exhibit 4) was to avoid any possible misunderstanding on the part of the employees as to just exactly what the payments were that they were going to receive. There was one other little reason that entered into the matter, as I recall. While almost all of the employees of the corporation who were transferred to the City were entitled to this bonus or additional compensation, there were a few who were not entitled to it, but who had been contributors to the Pension and Benefit Plan and who received a refund of their contributions to the Plan.

(Testimony of W. E. Houghton.)

But the main purpose was, as I stated first, to avoid any misunderstanding, to have one letter definitely state that they were receiving back, or going to receive back, their own contributions to the pension benefit plan, together with interest, as provided in that plan; and the other letter to show what they were going to, or at least the basis on which they were going to receive additional compensation for.

[47]

Not to my recollection was Mr. Poorman called into any of these discussions that I mentioned at which time some three or four of the company officials were present. It may be quite possible that Mr. Day or Mr. Masser, the Executive Vice President whom I mentioned, may have discussed the matter with him. I have no information as to that.

For 1937 as well as for many years past, the preparation of the old Company's federal income tax returns was directly under my supervision, and I actually did a lot of detailed work. I may have on occasion, and I think I did in some prior years, go to Mr. Poorman for his opinion or advice with respect to certain tax matters involved in the particular year's return. I don't recall that I consulted him with respect to the 1937 return, and I am quite sure that I didn't for this reason: Along about, oh, I should say 1935, Pacific Lighting employed a firm of tax attorneys for the purpose of furnishing advice to itself and to its subsidiary companies

(Testimony of W. E. Houghton.)

with respect to the filing of their income tax returns, and also the handling of any developments subsequent to the filing of the returns leading up to the settlement of the tax cases, so that from somewhere around 1935—it may have been a little earlier—tax matters generally were referred to this outside firm of tax attorneys.

I have with me the record of the Corporation that relates to this disbursement to Mr. Poorman. The Corporation's original record consisted of a list by names of the individual employees to whom these additional compensation payments were made, showing in each case the total amount of their regular wages during their past service. In the next column, the amount of the extra compensation to be paid them, followed by certain deductions for [48] Federal old age benefits and state unemployment insurance tax, arriving in the right-hand column at the net amount paid them as shown by the individual checks. Over across the back of this list appears the name of Samuel Poorman, Jr., showing the gross amount of his check, as is already in the record, together with the two deductions mentioned, arriving at the net amount of \$8,394.92. This is the preliminary record, and the total of the payments to the 800 odd employees is shown here as \$475,546.32. That amount divided into two items, as I will show, was charged to a ledger account designated as "Sale of Electric Properties, suspense account." This account showed

(Testimony of W. E. Houghton.)

in black entries the total expenses in connection with the sale of these properties. It showed in red ink figures the amount received from the City for the properties, together with any other credits necessary in order to arrive at the net profit, net credit resulting from this sale. This total amount of extra compensation, additional compensation, is represented by two vouchers covering the deposit of the amount of money in a special bank account against which these individual employee checks were drawn. The first voucher is dated February 17, 1937, in the amount of \$473,702.47, and duly entered as a debit or expense item in black ink in this special ledger account. The balance making up the grand total previously mentioned, this balance being \$1,843.85, is covered by a voucher dated February 27, 1937, and duly entered in a similar manner in this same ledger account. The record shows that at the close of February the net balance was transferred to surplus account in the amount of round figures, \$6,100,000, resulting from the sale of those electric properties at an agreed price of \$46,000,000 plus. That net balance was the profit [49] figured on the sale up to that time based on the expense items that had come through and been paid and after providing an estimated reserve for federal income taxes and state bank and corporation franchise tax upon the profits. That was the estimated net profit transferred to surplus. However, following on during March and April were some additional strag-

(Testimony of W. E. Houghton.)

gling amounts of expense which we hadn't been able to ascertain accurately at an earlier date that were charged to this account and also a clean-up sale of materials and supplies to the City of Los Angeles, supplies applicable to the electric properties, that resulted in an additional surplus credit of \$20,813. So that these additional compensation expenditures in question were definitely charged to expense; although it is not particularly relevant here, in the consideration later of its own income tax return these extra compensation payments were allowed as proper expenses in arriving at taxable net income. This language that is quoted of additional compensation, as I said, runs through all the records. On these two vouchers on which I have just testified, the same language appears, "Additional compensation for past services" and so forth. The company made out its federal income tax return in accordance with this same treatment of this particular item. There were certain charges made to this account which were not proper deductions for Federal income tax purposes, but so far as this item of additional compensation is concerned, it is treated exactly as it runs through all of the records. [50]

Cross Examination of W. E. Houghton

The Corporation's return for 1937 shows net income for excess-profits computation to be \$15,487.429.60, and Schedule E attached to the return shows a taxable profit from the sale of electric properties of \$13,360,895.75, which is part of said fifteen mil-

(Testimony of W. E. Houghton.)

lion dollar item. Said Schedule E shows the expenses of sale, \$3,306,000.00, and the items back of that include this extra compensation. This deduction comes as a deduction as against the sale of capital assets and not as a deduction in respect of ordinary operating expenses. We intentionally set out on our books our regular operations separate and apart from the profit resulting from the sale of the Electric properties, and in our return in Schedule E we set out the same thing, the sale of the electric properties entirely separate from regular operation. In respect of ordinary operations to the best of my knowledge, no extra compensation was ever accorded the Petitioner at any time during his employment by Los Angeles Gas and Electric Corporation, otherwise than by antedating for three months an increase in salary granted to him in 1929. I don't recall any payments that the Petitioner ever received from the company other than his monthly salary prior to the payment here in question.

Q. (By Mr. Poorman) Now, how is it that no part of this additional compensation was reflected in the ordinary operating expenses of the Corporation covering any period of time if, indeed, it was extra compensation for services rendered by the Petitioner.

A. Well, in the first place, the company's books for all years past in 1937 had been definitely closed at the time that the determination

(Testimony of W. E. Houghton.)

was definitely made to pay this amount of extra [51] compensation, so that it would have been impossible to go back even had they so desired and pro-rate or apportion this to any prior period of years.

Q. Well, then, for the tax year 1937, why was that not made as a charge in the nature of ordinary operating expenses?

A. Well, it was so definitely not ordinary operating expenses; it would never have been made except for the sale of the electric properties or some other abnormal or extraordinary transaction.

To my knowledge Petitioner had little or nothing to do with the sale of electric properties. So far as I know he did not. But this item, as I have testified, was charged against the expenses of sale and was one of the items deductible from the gross proceeds of that sale in order to determine the profit on the sale. Everything considered, I think it was a pretty good sale. The Corporation had been subjected to long drawn out and expensive litigation in which its rights to use the streets to distribute either gas or electricity for other than lighting purposes had been brought in question. The Petitioner was almost exclusively engaged in work in that litigation from 1927 until the sale was effected, and that is why I stated I did not think he had anything to do with the negotiations for the sale of the electric properties.

(Testimony of W. E. Houghton.)

The determination to make the payments to the transferred employees in the form of additional compensation was arrived at some time in late November, 1936, or early December. The agreement of sale was executed along about October 22, 1936, but before that sale could be effected there had to be an election and a voting upon the bonds necessary to effect the purchase by the City, which was held in the middle of December, 1937 (1936). So that [52] until that election occurred no one knew definitely that there would be a sale under the then pending negotiations.

So far as I know, Petitioner had nothing whatever to do with any of the conferences respecting pension matters, or the taking over of employees by the City. In these conferences with respect to deciding on some sort of a payment to the employees, Petitioner did not participate.

Q. (By Mr. Poorman) And what was it that led to the adoption of the characterization of this payment as additional compensation other than the fact that you could not make suitable arrangements for the carrying on of some sort of pension arrangement by the Metropolitan Life Insurance Company in favor of the transferred employees?

A. Well, since we have mentioned the tax angle, that came into the consideration to make the payment in such manner as would be considered a proper deductible expense.

(Testimony of W. E. Houghton.)

Q. Of the Corporation?

A. Of the Corporation.

Q. As against the profit on the sale.

A. That is true.

There would be no question of the so-called compensation except for the sale of the electric plant to the City. There was no question of the extra compensation of the employees retained by the Corporation.

Q. Is there any account with respect to the account that you have already testified, that is, the account having to do with the profit on the sale of the electric plant, in which any portion of the so-called extra compensation paid to the affected employees is reflected?

A. No other account.

To the best of my recollection I had not consulted with the Petitioner on any point in connection with the Corporation's 1937 income tax return. The Petitioner had no connection with the [53] merger of Los Angeles Gas and Electric Corporation with Southern California Gas Company in May, 1937. The preparations for that merger didn't commence until after the conclusion of the sale of the electric properties to the City on the last day of January, 1937.

(Testimony of W. E. Houghton.)

Redirect Examination of W. E. Houghton

Mr. Poorman, at the time of this sale of assets in January, 1937, was one of the regular salaried attorneys working under the General Counsel of the Company in the Legal Department. The General Counsel was located in the same office building and the same department in which Mr. Poorman worked. The last four or five years, three or four years, of Mr. Poorman's connection with the Corporation were spent exclusively or practically exclusively in connection with the franchise litigation against the Company by The City of Los Angeles with reference to both its gas and electric franchises. To the best of my knowledge, in that connection Mr. Poorman had decidedly rendered satisfactory services. And all during his service for the Company, he certainly had been a valuable employee. As to Mr. Poorman's increase in salary in 1929, I don't think there is any question on anybody's part but that it was regular salary and made retroactive for the entire calendar year.

SAMUEL POORMAN, JR.,

the Petitioner, re-presenting himself as a witness in his own behalf, testified further as follows:

Direct Examination

From August, 1927, forward until the conclusion of the Pasadena franchise case, I was engaged almost exclusively on the Los Angeles Electric franchise case, the Los Angeles gas franchise [54] case, and the Pasadena gas franchise case, the last of which was decided about December, 1935. I had already appealed in the Los Angeles cases and, after perfecting the record on appeal, was engaged in writing the brief, which was a voluminous matter and occupied me right up to the time I left the Corporation. I had none of its general affairs in my hands, although any officer might ask me some detached question from time to time, but nothing that required research or any extensive draftsmanship did I do for the Company after I became interested in the electric franchise case, except for a period of about six months following the bursting of the St. Francis Dam in 1927, when the City had so many troubles on its hands that the then pending franchise case became quiescent. That was the only time I had taken up general work after the franchise cases started, except for the sporadic questions that came up. I participated in none of the negotiations that resulted in the sale of the electric properties to the City.

The parties agree that the foregoing is all of the evidence adduced at the hearing before the United States Board of Tax Appeals material to this proceeding.

SAMUEL POORMAN, JR.,

Petitioner on Review.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed March 3, 1942. [55]

[Title of Board and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals, Washington, D. C.:—

You are hereby requested to prepare and certify, and to transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in the manner and within the time required by law and the rules of said Court, a typewritten copy of the Record on Review under Petitioner's Petition for Review of the Decision of the United States Board of Tax Appeals in the above-entitled cause, and to include therein a copy of each of the following entries and documents, to-wit:

1. The docket entries of all proceedings before the Board of Tax Appeals.
2. The pleadings before said Board, as follows:

(a) The Petition for Redetermination of
Deficiency;

(b) The Answer of Respondent thereto.

[56]

3. The Findings of Fact and Opinion of said
Board.

4. The Decision of said Board.

5. The Petition for Review of said Decision.

6. The Statement of Evidence on review, as
approved.

7. This Praeipice.

SAMUEL POORMAN, JR.,

Petitioner pro se.

Address: 1256 West 7th Street, Los Angeles, Cali-
fornia.

[Endorsed]: U.S.B.T.A. Filed Jan. 10, 1942. [57]

[Title of Board and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax
Appeals, do hereby certify that the foregoing pages,
1 to 57, inclusive, contain and are a true copy of the
transcript of record, papers, and proceedings on file
and of record in my office as called for by the
Praeipice in the appeal (or appeals) as above num-
bered and entitled.

In testimony whereof, I hereunto set my hand and
affix the seal of the United States Board of Tax

Appeals, at Washington, in the District of Columbia, this 4th day of March, 1942.

(Seal)

B. D. GAMBLE,

Clerk,

United States Board of Tax
Appeals.

[Endorsed]: No. 10090. United States Circuit Court of Appeals for the Ninth Circuit. Samuel Poorman, Jr., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed March 18, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10090

17
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL POORMAN, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF FOR PETITIONER.

On Petition to Review Decision of United States
Board of Tax Appeals.

FILED

MAY - 5 1932

SAMUEL POORMAN, JR.,
207 South Broadway, Los Angeles,

PAUL F. O'BRIEN,
CLERK
Petitioner pro se.

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No. 10090

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL POORMAN, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF FOR PETITIONER.

On Petition to Review Decision of United States
Board of Tax Appeals.

Jurisdiction on Review.

Petitioner (hereinafter designated "Taxpayer") seeks a review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision by the United States Board of Tax Appeals redetermining (in conformity with Respondent's prior determination), a deficiency in United States Individual Income Tax due from Taxpayer for the calendar (and taxable) year 1937 in the amount of \$708.92 (less the portion of said amount assessed and/or assessable by reason of the inclusion in his taxable income of the sum of \$18.45,—a loss by casualty, claim for which has been heretofore abandoned). The jurisdictional facts are alleged in the Petition herein [Tr. pp. 33-34], and bring the case within the provisions of the Internal Reve-

nue Code, § 1141 (a) and (b) [U.S.C.A., Title 26]. Said Petition for Review was filed on December 5, 1941 [Tr., p. 2] within three months after the rendition of the decision of said Board on September 12, 1941, as prescribed by § 1142 of the Internal Revenue Code [U.S.C.A., Title 26].

Jurisdiction of Board of Tax Appeals.

Taxpayer's income tax return for 1937 was made to the office of the Collector of Internal Revenue of the Los Angeles Division, Sixth District of California, in The City of Los Angeles within the Ninth Circuit. Taxpayer's Petition for a redetermination of such deficiency by the Board of Tax Appeals was filed on May 27, 1940 [Tr., p. 1], within ninety days after the mailing by said Collector to Petitioner, on March 27, 1940, of the Notice of Deficiency [Tr., p. 4, 9-12]. The jurisdictional facts are set forth in said Petition last mentioned [Tr., pp. 3-4]. Accordingly, under § 272 (a)(1) of the Internal Revenue Code [U.S.C.A., Title 26], said Board had jurisdiction of such Petition for redetermination.

Question Presented.

The question presented is whether the sum of \$8,394.92 paid to Taxpayer by his *former* employer, Los Angeles Gas and Electric Corporation (hereinafter sometimes designated "Gas Company"), constituted *additional compensation* for *past services* (and therefore taxable income), or whether the same constituted a *gift* (and therefore to be excluded from gross income as exempt from taxation). Said payment and payments of like character were made by said Corporation to its former employees who, by reason of the sale of its electric properties to The City of Los Angeles, entered the employ of the City.

Statute Involved.

The statute under which such question arises is the Revenue Act of 1936, Sections 21, 22(a), and 22(b)(3). Those sections provide, in part, as follows:

“Sec. 21. NET INCOME. ‘Net income’ means the gross income computed under Sec. 22, less the deductions allowed by Sec. 23.

“Sec. 22. GROSS INCOME. *General Definition.*—‘Gross income’ includes gains, profits and income derived *from salaries, wages, or compensation* for personal service, of whatever kind and in whatsoever form paid, *or from professions*, vocations, trades, businesses, * * *;

(b) *Exclusions from gross income.*—The following items shall *not* be included in *gross income* and shall be *exempt* from taxation under this title: * * *

(3) *Gifts, bequests and devises.*—The value of property acquired by *gift*, bequest, devise or inheritance * * *;

Decision and Opinion of Board of Tax Appeals.

The decision of the United States Board of Tax Appeals [Tr., pp. 32-33] in favor of Respondent (hereinafter designated "Commissioner") is based upon its Findings of Fact [Tr., pp. 15-25], wherefrom that Board in its Opinion [Tr., pp. 25-31] concluded that the payment in question was *not* an *absolute gift* but was *additional compensation* for *past services*. The Board so concluded notwithstanding "the Corporation [payor] saw fit to enter [on its books and in its income tax return] the payment made to [Taxpayer] and to the other [former] employees as *an expense item in the sale of its electric properties*, [with which] they, and especially he, *had nothing to do*," upon the ground that Taxpayer "has *not* sustained his burden [of overcoming] the *presumption of correctness* attaching to [Commisisoner's] determination that the payment was *not* a gift * * * merely by proving * * * that it was *improperly treated* upon the books of the Corporation." In its opinion, the Board adds:

"In other words, it was incumbent upon Petitioner *to prove* that the Corporation was *not discharging* some *obligation to him* by making the payment in question. The evidence indicates that the payments were made *to compensate the employees for their rights* under the 'Uniform Pension and Benefit Plan' *or to enable the company to withdraw the funds* which had been put up with the Insurance Company in connection with such plan. This, in our opinion, *was sufficient consideration to prevent the payments being absolute gifts*." [Tr., pp. 30-31.]

Assignments of Error.

Taxpayer assigns as error herein:

(1) Said Board's finding and determination that said sum of \$8394.92 constituted *additional compensation* paid to Taxpayer by his *former* employer for *past* services;

(2) Said Board's *failure* to find and determine that such payment was a *gift* to Taxpayer and non-taxable income;

(3) Said Board's finding and determination of the existence of a deficiency in income tax due from Taxpayer for the year 1937 by reason of such payment to him; and

(4) Said Board's *failure* to find and determine that there was and is no such deficiency. [Tr., pp. 35-36.]

Summary of Argument.

In outline, Taxpayer relies upon the following Points of Law and Fact:

(1) In its essence, the payment in question constituted a *gift* and therefore was nontaxable income. [Revenue Act of 1936, Sec. 22(b)(3); *Bogardus v. Commissioner*, 302 U. S. 34.]

(2) The designation of the payment by Taxpayer's former employer "as additional compensation" is negated by the circumstances;

- (i) When Taxpayer on January 25, 1937, was first notified by the president of Los Angeles Gas and Electric Corporation, the employer, of the fact and amount of the proposed payment to him, it was *not* designated as "*additional compensation*," but as the "*giving of a bonus*" that "*Pacific Light-ing Corporation*, which held *all of the common stock* of the Los Angeles Gas and Electric Corporation, *had arranged for.*" [Tr., pp. 40-41.]
- (ii) The designation of the payment "as additional compensation, in *recognition* of the value of your past services," was first made in a circular letter addressed "To Employees About to be Transferred from the Service of Our Company" [Tr., pp. 45-47], dated January 25, 1937, a copy of which was received by Taxpayer only "after [he] had left the employ of the corporation." [Tr., p. 42.]
- (iii) Although said payment was made by check, dated February 17, 1937, designating it as "additional compensation for services to and including January 31, 1937, in accordance with" said letter, nevertheless in the *employer's books*, as also in

its income tax return for the year 1937, the gross amount of *all payments of the same character* was carried into a special ledger account designated "*Sale of Electric Properties, Suspense Account,*" wherein were set up *solely* the items of *receipts and disbursements* in connection with the employer's said *sale* of its electric properties, and the aggregate of said payments was treated, in both said book and said tax return, as one of the "*expenses of sale*" and *deducted*, in like manner with other items of such expense, *from the selling price* in order to *determine the taxable profit realized from such sale*. [Tr., pp. 59-65.]

- (iv) Neither Taxpayer nor any other of the employees receiving payments of like character *had the remotest connection with the sale* of their employer's electric properties. [Tr., pp. 63 and 67.]
- (v) Such payments were *not* charged as an *operating expense* of the business conducted by Taxpayer's former employer, either in the year in which they were made or as of any previous year, for the reason that they were "*so distinctly not an operating expense.*" [Tr., p. 63.]
- (vi) Taxpayer was paid *in full* for his services *monthly* as they were performed, and each voucher check specified that it was "*in full settlement [for] services as attorney during*" the month covered thereby. [T., p. 41.]
- (vii) After the termination of his employment, Taxpayer *did not perform*, and was *under no obligation to perform*, any service whatsoever for his former employer, *nor* was he *obligated* even to *enter its vendee's employment*.

ARGUMENT.

(a) Statement of Facts.

(1) For approximately 17 years prior to February 1, 1937, Taxpayer had been employed as an attorney at law by Los Angeles Gas & Electric Corporation, a corporation that, throughout such period, had rendered a public utility gas and electric service in Los Angeles, California, and in certain adjacent communities. [Tr., pp. 15 and 40.]

(2) On January 31, 1937, a sale of said Corporation's electric properties to The City of Los Angeles was consummated, and some 840 or 850 employees of the Corporation were transferred to the Department of Water and Power of The City of Los Angeles. Taxpayer was one of these, although he did not enter the employ of that Department until March 1, 1937. The employees so transferred constituted about one-third of the then personnel of the Corporation, which thereafter continued solely its gas business, and in May, 1937, it was consolidated by a merger with Southern California Gas Company. [Tr., p. 16.]

(3) For approximately 10 years prior to the termination of Taxpayer's employment by Los Angeles Gas and Electric Corporation, he had been engaged as its attorney exclusively in long drawn out and expensive litigation, *i. e.*, (i) two actions instituted by The City of Los Angeles to enjoin said Corporation's use of that City's streets for the distribution of gas and electricity, respectively, for any purpose other than lighting; and also (ii) one action instituted by the City of Pasadena to enjoin said Corporation's use of the streets of the city last named for the distribution of gas except for lighting. [Tr., pp. 40 and 67.]

(4) Said litigation with The City of Los Angeles ultimately led to a settlement of the controversy with it by a sale of the Corporation's electric properties to that City for \$46,000,000.00 plus. With this settlement and sale, Taxpayer *had nothing whatsoever to do*. [Tr., pp. 40, 60-63, 67.]

(5) On January 30, 1937, Taxpayer was paid in full by Los Angeles Gas and Electric Corporation for all services by him rendered, and to be rendered, during the month of January, 1937. He had theretofore been paid in full by said Corporation for all services by him rendered, and to be rendered, prior to January 1, 1937. The checks by which such payments were made were identical in form with that for January, 1937, [Petitioner's Exhibit 1], the detachable voucher whereof reads as follows:

"Statement of Account. *In full settlement of which payee has accepted* Los Angeles Gas and Electric Corporation check, annexed hereto: Samuel Poorman, Jr., January 30, 1937, services as attorney during the month of January, 1937,—\$1,000.00. Payee will please detach and retain this statement." [Tr., pp. 16-17, 41, 44-45.]

(6) On January 25, 1937, Taxpayer was notified *in person* by A. B. Day, the then president of Los Angeles Gas and Electric Corporation, that his work with the Corporation was finished and that the attorney for the Department of Water and Power of The City of Los Angeles had asked that, "if there was anybody to be transferred from the Legal Department [of the Corporation] to [said] Department, [Taxpayer] should be transferred." In the course of this conversation, Mr. Day stated that "*Pacific Lighting Corporation* had arranged

for *the giving of a bonus* to the employees to be transferred to said Department” with the sale to the City of the electric properties. [Tr., pp. 40-41.]

(7) Pacific Lighting Corporation was the *holding company* of which Los Angeles Gas and Electric Corporation was the principal subsidiary. The holding company owned *all of the common stock* of such subsidiary, and *completely dominated* the management and control thereof; and at all times during Taxpayer’s employment by the latter the *earnings of the subsidiary sufficed to cover several times its preferred stock dividends*. [Tr., p. 43.]

(8) At the interview between Taxpayer and Mr. Day on January 25, 1937, the latter did *not* make any mention that said bonus, for which *Pacific Lighting Corporation* had so *arranged*, was to be paid or given as additional compensation, but merely characterized it as “*given in recognition of [Taxpayer’s] fine work in [said street] franchise cases.*” [Tr., pp. 42-43.]

(9) Some time after January 25, 1937, Taxpayer received by mail, at his residence, a circular letter dated January 25, 1937, addressed “To Employees About to be Transferred from the Service of our Company,” which contained the declaration: “*Arrangements have been made to grant you additional compensation in recognition of the value of your past services. The amount of this payment will be based upon your present attained age, your length of service with the Company, and the rates of wages received during the period of employment; but this extra compensation will not be paid to employees whose ‘employment date’ is more recent than September 1, 1934.*” [Tr., pp. 21-22.]

(10) Taxpayer received the payment in question, \$8,394.92, on or about February 19, 1937. The detach-

ble voucher of the check by which this payment was made contains the following: "Additional Compensation for services to and including January 31, 1937, in accordance with the president's letter of January 25, 1937," [Petitioner's Exhibit 2]. This language appeared *only* on this and other checks of like character, all *salary checks* received by Taxpayer having on their respective vouchers the statement, as in Petitioner's Exhibit 1, "Services as attorney during the month" specified and covered thereby. [Tr., pp. 16-17, 23, 41-42, 44, 56.]

(11) On Taxpayer's United States Individual Income Tax Return for 1937, said amount of \$8,394.92 was reported in Schedule H, *i. e.*, nontaxable income other than certain interest, as follows: "Bonus received from Los Angeles Gas and Electric Corporation after leaving its employ upon transfer of its electric system to The City of Los Angeles, (*not* having been paid or received *as a consideration for services rendered*, and the same constituting a *gift*, as held in *Bogardus v. Commissioner of Internal Revenue*, [302 U. S., 34]; 82 L. ed. 90), * * * \$8,394.92." [Tr., p. 43.]

(12) The total of the payments of the so-called "additional compensation" was \$475,546.32, which was charged to a ledger account of the payor designated "*Sale of Electric Properties, Suspense Account*," as a debit made up of two expense items. These two items represented two deposits in a special bank account against which checks in favor of the several transferred individual employees were drawn, and on each of the two vouchers covering these deposits appears the wording, "*Additional compensation for past services*"; and in the Corporation's own *Federal Income Tax Return* for 1937, "so far as this item of *additional compensation* is concerned, it is *treated exactly*

as it runs through all of the records." On that return "the net income for excess profits computation" appears as \$15,487,429.60, and "Schedule E, page 6, attached to the return, shows a *taxable profit* from the *sale* of electric properties of \$13,360,895.75," which was carried over into Schedule A and became a part of said item of \$15,487,429.60. In Schedule E, the *expense of the sale* of said electric properties is given as \$3,306,000.00, and "the items back of that *include this extra compensation*," none of which is reflected in any other account of the Corporation. [Tr., pp. 23-24, 59-61, 61-62, and 65.]

(13) In the Corporation's books and also in its said Income Tax Return for 1937, the so-called "additional compensation" was made a "deduction" as against the *sale of capital assets*,—and *not* as a deduction of *expense incurred in its ordinary operations*. The book accounts and the Income Tax Return in respect of such *ordinary operations* were "*intentionally set out separate and apart from the profit* resulting from the *sale* of the electric properties." The so-called "additional compensation" was *not reflected* in the *ordinary operating expenses* of the Corporation covering any prior or other period of time; and for the tax year 1937 was *not entered* as a charge in the nature of *ordinary operating expense*, because "it was so definitely *not ordinary operating expense*; it would *never* have been made *but for the sale* of the electric properties or some other abnormal or extraordinary transaction." [Tr., pp. 61-63.]

(14) *No bonus or additional compensation* whatsoever was paid to the *employees retained* by Los Angeles Gas and Electric Corporation, and *no extra payment* other than that here in question was ever made by the Corporation to Taxpayer. [Tr., pp. 24, 62, 65.]

(15) *Taxpayer had nothing to do with the sale of the electric properties*, nor did any other employee of the Corporation who was transferred to the Department of Water and Power and to whom the so-called “additional compensation” was paid. [Tr., pp. 24, 40, 63, 66-67.]

(16) The characterization of the payments as “additional compensation” was determined upon after it was ascertained that the Corporation could not make suitable arrangements for the continuance by the Metropolitan Life Insurance Company of some sort of pension in favor of the recipient employees; but, in addition, “since we have mentioned the *tax angle*, that came into the consideration *to make the payment in such manner as would be considered a proper deductible expense of the Corporation as against the profit on the sale.*” [Tr., pp. 54-55, 64-65.]

(b) The Controlling Force of *Bogardus v. Commissioner*, 302 U. S. 34.

The hopeless conflict in the decisions that prevailed prior to *Bogardus v. Commissioner*, *supra*, (1937), was therein resolved and once for all set at rest by the Supreme Court; and the foregoing “Summary of Argument” and “Statement of Facts” brings the case at bar within its controlling authority.

Preliminary to our treatment of the *indicia*, in the case at bar, that the payment in question was a *gift*,—and *not* compensation,—a precise apprehension of the facts in the case cited and of their bearing upon the Supreme Court’s ruling is essential.

In *Bogardus v. Commissioner*, *supra*, the taxpayer received \$10,000.00 out of a total distribution, aggregating more than \$600,000.00, made by Unopco Corporation to

persons who had theretofore rendered service as employees to Universal Oil Products Company, an immensely successful concern, the entire capital stock of which had been acquired by United Gasoline Corporation. In contemplation of such acquisition, Unopco Corporation had been organized to acquire certain of the assets of Universal Oil and its only business was the investment and management of these assets. *The former stockholders of Universal Oil became stockholders of Unopco with the same proportionate holdings*, but after United Gasoline acquired the Universal Oil stock none of them held any stock in either of those companies. After such acquisition Universal Oil continued to carry on the same business.

The then stockholders of Unopco proposed to show their *appreciation* of the loyalty and support of some of the employees of Universal Oil by making them a "gift or honorarium," and appropriate resolutions were adopted by them and by Unopco's Board of Directors. Some of the recipients had been in the employ of Universal Oil for many years. It was stipulated that neither Universal Oil nor United Gasoline was *under any legal or other obligation* to pay said employees any additional compensation, and that neither Unopco nor any of its stockholders, nor any stockholders of Universal Oil, was at any time *under any legal or other obligation* to pay any consideration whatever to said employees; that said payments were not made, or intended, as payment or compensation for any services rendered or to be rendered, or for any consideration given or to be given, by the employees to Unopco or its stockholders. *None of the three corporations or their stockholders ever made or claimed any deduction of these payments for Federal income tax purposes, and they were charged not to expense but to surplus account on*

Unopco's books. The statement accompanying the payments declared them to be made as a gift and gratuity, and, therefore, not subject to income tax.

The Board of Tax Appeals held the payments to be additional compensation and subject to tax. In reversing this decision, the Supreme Court rejected the view of said Board that such payments "may be at once 'gifts' under § 22, subdivision (b) (3) and 'compensation for personal service' under subdivision (a)," Revenue Act of 1928. [302 U. S. 39.] The Court said:

"Such a view of the statute is inadmissible and confusing. The statute *definitely distinguishes* between *compensation* on the one hand and *gifts* on the other hand, the former being taxable and the latter free from taxation. The *two terms* are, and were meant to be, *mutually exclusive*; and a bestowal of money *cannot*, under the statute, be *both* a *gift* and a payment of *compensation*." [302 U. S. 39.]

The Court then examines the evidence to determine whether or not the claim that the payment was a gift was genuine or fictitious, and, in support of the genuineness of the claim, points out these salient *indicia*.

(a) The recipients were never employees of Unopco or its stockholders.

(b) Universal Oil was not at the time connected with Unopco or its stockholders.

(c) Some of the recipients had not been in the employ of Universal Oil for many years, and one had never been an employee.

(d) Neither Unopco nor anyone else was under any *obligation* to pay the recipients any compensation.

(e) The payments “*were not made or intended to be made for services rendered or to be rendered or for any consideration given or to be given by*” the recipients to Unopco or its stockholders.

(f) “*If the disbursements had been made by Universal Company, or by the stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there might be ground for the inference that they were payments of additional compensation. * * ** But such an inference * * * *well might strain the realities in the light of the foregoing facts.*”

(g) “The disbursements here were authorized and the burden borne by persons who were then strangers to Universal Company and its employees, under no obligation, legal or otherwise, to that company or to any of its present or former employees.” [302 U. S. 40-41.]

The Court proceeds:

“There is entirely *lacking* the constraining force of *any moral or legal duty* as well as the *incentive of anticipated benefit* of any kind beyond the satisfaction which flows from the performance of a generous act. * * *

“The stockholders of the Unopco, having at the time no connection with the Universal [Oil] Company, but rejoicing in the fact of their own great good fortune, and *mindful of the former loyal support* of a number of employees of the Universal [Oil]

Company, and desiring to remember them ‘in the form of a gift or honorarium,’ resolved to make through the Unopco company the distribution in question. In doing so, they were moved, as Judge Swan said in his dissenting opinion below, to an act of ‘spontaneous generosity.’ We agree with this dissenting opinion of Judge Swan, and the dissenting opinion of Judge Morton in *Walker v. Commissioner, supra*, [88 Fed. (2d) 61], as stating the correct view of the matter.” [302 U. S. 42.]

The Court notes as “the only facts which even seem to militate against this view,” the following:

“(1) That the Unopco stockholders *had benefited* by the former services of the recipients;

“(2) That the stockholders at their meeting described the payment as a gift or ‘*honorarium*,’ and

“(3) That the resolutions authorized the payments as a ‘*bonus * * * in recognition of the valuable and loyal services*’ of the employees.” [302 U. S. 42.]

These facts the Court meets as follows:

“1. Because the Unopco stockholders had *benefited* by the past services of the recipients, it by no means follows that the distribution in question was *not a gratuity*. It *nowhere appears* in the record that *full compensation* had *not been made* for these services. There would seem to be a natural inference to the contrary; and the inference is made determinate by the stipulated fact that no one was under any

obligation, legal or otherwise, * * * to pay any additional compensation. *There is no ground for saying that the benefit received and the compensation then paid for it were not equivalents.*"

2. Even if the word "honorarium" denotes a "compensatory payment," it is here coupled with the word "gift," which, as it does *not* include a *compensatory* payment, could not have been used to nullify the former expression.

3. The word "bonus" in the resolutions was used and is to be understood in the light of the intention, expressed at the stockholders' meeting, to make gifts. [302 U. S. 42-43.]

The Court adds:

"In *Rogers v. Hill*, 289 U. S. 582, 591-592, we held, following the dissenting opinion in the court below, that a bonus payment *having no relation to the value of services for which it is given* is in reality a *gift* in part. Certainly, where all the facts and circumstances in the case, * * * clearly show the making and the intent to make a *gift*, it *cannot be converted into a payment for services by inaccurately describing it*, in the consummating resolutions, as a *bonus*.

"Some stress is laid on the recital to the effect that the bounty is bestowed *in recognition of past loyal services*. But this recital amounts to *nothing more than the acknowledgment of an historic fact as a reason for making the gifts*. A gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient." [302 U. S. 44.]

(c) Indicia in the Case at Bar That the Payment Was Not Compensation But a Gift.

The correspondence between the salient facts of the case at bar and those upon which the Supreme Court based its decision in the *Bogardus Case*, *supra*, is striking. That the payment to Taxpayer here in question was in its essence a gift and not compensation will be apparent upon a consideration of the following circumstances:

(1) *Taxpayer rendered no service whatever in connection with the sale of Gas Company's electric properties nor in any of the negotiations therefor.* Although an attorney at law, whose training and specialized experience might have made him available in that connection, he was as totally dissociated from the transaction as was any lineman or other operating employee of Gas Company.

(2) Gas Company's characterization of the payments to transferred employees as "additional compensation *in recognition of the value of your past services*," is contradicted by its book accounts and also by its income tax return, wherein that Company did *not* treat such payments as an *operating expense* (which alone they could be if *in fact* "additional compensation"), but as a *unique expense incurred in the making of the sale of its electric plant and business.* As *none* of the recipient employees had *ever* performed *any services* whatsoever in connection with such *sale*, and had never been,—as indeed they *could not* have been,—paid *any compensation initially* in that behalf, it was simply (and equally) *impossible* to pay them "additional compensation" therefor.

(3) Gas Company's president, in notifying Taxpayer of the termination of his employment, stated that "Pacific Lighting Corporation [the holding company] had ar-

ranged to give a bonus" to this Taxpayer "*in recognition of,*"—and *not as compensation* for,—"*his fine services in the franchise cases,*" the litigation on which Taxpayer had been exclusively engaged for some ten years and by which *his participation* in the negotiation or consummation of the *sale* of the electric properties would have been *rendered impossible*. [Tr., pp. 40-41, 44, 66-67.]

(4) Taxpayer's employment was at Gas Company's will and he was paid in full for his services *monthly* as they were performed. Each salary check delivered to him (including the closing check delivered *after* his said conversation with Gas Company's president), set forth that it was "*in full settlement [for] services as attorney during*" the month covered thereby and specified therein. [Tr., pp. 41 and 44.]

(5) The payment to Taxpayer had been "*arranged for*" by Pacific Lighting Corporation, *the holding company which held all of the common stock* of Gas Company; and, as the net profits of Gas Company had at all times sufficed to cover several times its preferred dividend requirements, the payment was, in effect, *a donation out of funds equitably belonging to Pacific Lighting Corporation* and could *not* in anywise affect preferred stockholders. [Tr., pp. 40, 43-44.]

(6) The payments to the transferred employees were *not* made for services *to be rendered* either to the Gas Company, or to the Department of Water and Power of The City of Los Angeles, or otherwise. [Tr., pp. 44-45.]

(7) Said payments were *not* made *on condition* that the respective recipients should *enter the employ* of said Department of Water and Power, and, indeed, Taxpayer did *not*, for a month after the sale, *enter that employment*. [Tr., pp. 40-44.]

(8) In the making of said payments, there was *no incentive to maintain the good will and loyalty* of the recipient employees, for neither Gas Company nor Pacific Lighting Corporation had *any interest* in the *continued success* of the business transferred to the City or in the *maintenance of such good will and loyalty*.

(9) The *sale* was a very *advantageous* one, not only because it *terminated* long drawn out and costly *litigation* respecting both the electric and the gas franchises of Gas Company in Los Angeles, but because it resulted in a *net profit* to Gas Company, as set forth in its Income Tax Return, of \$13,360,895.75 after all deductions (including \$3,306,000.00 *expenses of sale*, of which the \$475,546.32 *paid to the transferred employees constituted part*). This was a profit of approximately *forty per cent* (40%). [Tr., pp. 60-63.]

It requires no argument to demonstrate that the payment to Taxpayer could *not* have its *essential character* changed by Gas Company's denomination of it as "additional compensation." In fact, Gas Company's action in this behalf was *self-frustrated*. Even if a payment may be "additional compensation" for *past services* which have *already* been compensated *in full*, it cannot be either "*additional compensation*," or *compensation at all*, if it purports to be in consideration of services in which the recipient had *never been engaged*, to which he had *never contributed*, and for which he *could not*, therefore, have received any *initial* compensation. Even in the circular letter addressed by Gas Company to the recipient employees, the payment was characterized as "additional compensation *in recognition of the value* of your past

services,”—the use of the italicized words (instead of some such expression as “in *consideration* of your past services”), having the aspect more of a recital of the *motive* by which the payment was actuated than of a *legal consideration* therefor. When we find such a statement of *motivation* in a mere *circular* letter (of which Taxpayer received a copy only *after* being advised by Gas Company’s president that the payment *he* was later to receive was “in *recognition* of [his] fine work in the *franchise cases*”), the only natural conclusion is that the words italicized in the phrase above quoted from that letter were *not* intended to *contradict* what the president had orally stated to Taxpayer, but rather to *confirm*, in general terms, that oral recital of the *historic fact* constituting the *motive* for paying him a sum of money *to which he had no legal or other claim* and which Gas Company was under *no legal or other obligation to pay*.

It would ill become Taxpayer, as the recipient of his former employer’s bounty, to animadvert upon anything done by that employer in connection therewith. *If* the payment in question *was* properly *an expense of the sale* of Gas Company’s electric properties and, therefore, *deductible from the gross selling price* in order to determine the *profit* realized from that sale, then it could *not* have been “*compensation*” to Taxpayer, for he had *never* performed *any* service in connection with such sale; and even if it were possible to conceive of “*compensation*” in the absence of anything savoring of a *consideration* therefor,—*i. e.*, something paid *in return* for services,—then *this* payment could not have been “*additional compensation*,” for Taxpayer had not been paid any *initial* compensation [?] in that behalf. Such compensation as he *had* received during his employment by Gas Company was

an *ordinary operating expense* (and so treated by Gas Company), incurred in carrying on the normal or ordinary business of a public utility gas and electric company. He *was not hired* for any *other* purpose and *was never injected into* the matter of the *sale* of the electric properties,—an activity intrusted to attorneys in general practice retained for that special purpose, and by Mr. Houghton characterized as an “abnormal or extraordinary transaction” [Tr., p. 63].

Indeed, during the very period in which the negotiations for the sale were carried on, Taxpayer was so *exclusively* engaged in resisting the attacks of Los Angeles and Pasadena upon Gas Company’s franchises that he would have had *no opportunity to participate* in that “abnormal transaction” [Tr., pp. 63, 66-67], even if Gas Company had desired him to do so, and obviously it did *not* so desire. Taxpayer was *never consulted* relative to the sale or any matter related thereto. Moreover, Taxpayer had no connection with any conference respecting the transfer of employees by Gas Company to the City, or respecting the payments to be made them [Tr., p. 64]; nor was he consulted in respect of Gas Company’s 1937 income tax return; nor did he have any connection with the merger of Los Angeles Gas and Electric Corporation with Southern California Gas Company [Tr., p. 65]. In short, once the franchise litigation got into its stride, after the troubles of The City of Los Angeles growing out of the bursting of the St. Francis Dam in 1927 [? 1928] had been in some measure adjusted, Taxpayer handled *none* of the general or other legal affairs of Gas Company. [Tr., p. 67.]

(d) The Board's Attempted Distinguishment of *Bogardus v. Commissioner*, 302 U. S. 34, and Taxpayer's Answer Thereto.

The Board of Tax Appeals attempted to distinguish the case at bar from *Bogardus v. Commissioner*, *supra*. Next hereinafter we have indicated the several points in this behalf made in the Board's Opinion, appending to the statement of each thereof Taxpayer's answer to the same.

(1) Non-existence *Versus* Existence of Employer-Employee Relationship.

Board's Opinion: In the *Bogardus Case*, the "recipients of the bounty * * * were never employees of the [payor] company or any of its stockholders"; while Taxpayer in the case at bar had been with his fellow employees in the employ of Gas Company "until the sale of the properties to the City." [Tr., p. 26.]

Answer: In its essence, payment to Taxpayer was made out of assets belonging to Pacific Lighting Corporation, the holding company of the nominal payor Gas Company, and Taxpayer had never been in the holding company's employ or in the employ of any of its stockholders. Despite the terms of the circular letter and the check characterizing the payment as "additional compensation," Taxpayer was *specially advised* by the president of the Gas Company that the payment *to him* "had been arranged for" by the holding company,—not as "additional compensation,"—but "in recognition of his fine work in the franchise cases." Unquestionably, such recognition *motivated* the payment to Taxpayer, but this is very far from making it "additional compensation" for all his past services, approximately one-half of his period of employment having antedated the commencement of the fran-

chise cases. Taxpayer's defense of Gas Company in the suits to prevent its use of the public streets for the distribution of gas and/or electricity was for the purpose, and had the effect, of enabling Gas Company *to continue* its operations,—and *not at all* to effect a *sale* of its electric properties, a result brought about by the *highly profitable offer* therefor by the City induced by its desire *to prevent such continuance* of Gas Company in the business.

(2) Payment as a Solatium Versus Payment on a Moral Consideration.

Board's Opinion: In the *Bogardus Case*, “neither the [employer] nor anyone else was under any obligation, legal or otherwise, to pay any of the recipients * * * any salary, compensation, or consideration of any kind”; whereas Gas Company “was at least under a *moral* obligation to the employees whose services were being terminated through no fault of theirs by reason of the loss that that termination visited upon such employees of the benefits they would *otherwise* have been entitled to under the employer's “Uniform Pension and Benefit Plan.”

Answer: By the terms of the Pension and Benefit Plan, Gas Company reserved “the right to *discontinue* or change the Plan at any time,” and it was stipulated that neither the adoption of the Plan nor any action taken thereunder by the Benefit Committee “shall be construed as giving to any officer, agent, or employee of the Company *the right to be retained* in the service, *nor shall any employee, after termination of service, have any rights whatsoever hereunder, enforceable either at law or in equity*, except [under the] ‘employee options upon termination.’” These options were (a) either “to *leave* [the *employees*] *contributions* with the Insurance Com-

pany, or *to continue his contributions* to the Insurance Company,” and in either case to receive therefrom a monthly income for life from normal retirement date, *to the extent provided by such contributions* with interest [Tr., pp. 49-50]; and (b) “*to convert, within 31 days after termination of service, his death benefit into any of the life insurance policies issued by the Insurance Company, term insurance excepted, at the rate applicable to his* * * * *attained age and class of risk at such termination.*”

It is obvious, therefore, that there was *owing to Taxpayer*, whose service was terminated, *no obligation of any kind* that could serve as a legal or moral consideration for the payment received by him, but, on the contrary, that the same was *wholly spontaneous* on the part of his employer or, rather, on the part of his employer’s *sole common stockholder*. Note further that the employees *could not be deprived* of these *options* by the employer, and that the payments to the several transferred employees were made *irrespective of the manner* in which the individual employee *exercised such options*,—a matter of indifference to the employer. In other words, the transferred employees *lost nothing* upon their transfer *that was assured to them* by the Uniform Pension and Benefit Plan, that contingency having been *explicitly provided for* in the Plan and *having operated precisely as provided for*. What the transferred employee *did lose* was the *position* that he had theretofore occupied with the *prospect* of ultimately receiving a pension *contingent upon non-termination* of his employment *before* the specified age of *retirement*. The testimony of Mr. Houghton makes it clear that the payment to Taxpayer and his fellows *was motivated* by the consideration of this *loss of a prospective contingent*

benefit, but this is very far from making such loss a *consideration* for the payment. It was a mere *solatium* if ever there was one.

In the opinion below, it is said “the evidence indicates that the payments were made to *compensate* the employees for the *loss of their rights* under the ‘Uniform Pension and Benefit Plan’ or to *enable the Company to withdraw the funds which had been put up with the Insurance Company in connection with such Plan*. This in our opinion, was sufficient *consideration* to prevent the payments being absolute gifts.” [Tr., p. 31.] Apart from what we have just said in respect of the employer’s *motivation* as being the employee’s loss of position, and distinguishing such *motivation* from a legal or moral *consideration* for such payments, we note that the *other* suggested purpose of the payment,—namely, “to enable the company to withdraw the funds which had been put up with the Insurance Company,”—could not *possibly* constitute a consideration *except as between the employer and the Insurance Company*. It did not *move* from the several *employees*, and was totally *unconnected* with any *service* that they had theretofore rendered or were thereafter to render for the employer or anyone else.

(3) The Charge of Payment on Payor’s Books to Surplus Versus Expense.

Board’s Opinion: “In the *Bogardus Case*, the payments were charged ‘not to expense but to surplus.’ In the instant proceedings, the payments were charged to expenses of the sale of the electric properties,” and “the charge could properly have been so classified *only* if it had been *necessary* for the Corporation to make the payments *either to fulfill an obligation * * * or to regain pos-*

session of some of the money which had been put up [by it] with the understanding it would 'be used for employees' benefits and for no other purpose.'” [Tr., p. 28.]

Answer: The payments could *not* have been made to fulfill an obligation, moral or otherwise, in respect of the “*expenses*” of the sale of the electric properties, for *none* of the payees had rendered the *slightest service* in that connection; and, as already pointed out, if the employer made the payments to *regain possession of money* that it had put up with the Insurance Company on account of the employees’ contingent pensions, the obtaining by the employer of the money in this manner obviously was *not in consideration of the payees’ services* and could not constitute “additional compensation” therefor.

(4) Payor’s Designation of Payment as “Gift” Versus “Compensation.”

Board’s Opinion: In the *Bogardus Case*, the payments were referred to as a “gift or honorarium,” whereas in the case at bar they were designated as “additional compensation.”

Answer: To Taxpayer Mr. Day declared, before the circular letter was sent out, that the payment to him had been *arranged for* by Pacific Lighting Corporation (*the holding company*), as “the *giving* of a bonus.” This designation of the payment as a *gratuity* was borne out by his further statement, that it was “in *recognition* of Taxpayer’s fine work in the *franchise cases*,” and also by the treatment of *all* of the payments, both on the employer’s books and in its income tax return, as “*expenses of the sale of its electric properties*,” with which *none* of the payees *had anything to do*. If, by *first* inducing the

recipient employees, in *their* individual income tax returns, to treat the payments as “additional *compensation*” for their *actual* past services, and by *thereafter* classifying them, on its books and in its *own* tax return, as *expenses of the sale* of its electric properties in which *they* rendered *no* service), the employer succeeded in pulling the wool over the eyes of the Collector of Internal Revenue in order to induce him to allow such payments as a *deduction* from *its* gross income, it perpetrated a wrong from which it should not be permitted to profit as it *has* done—*i. e.*, by imposing on the recipients a burden of taxation with which they were *not* chargeable and thus *escaping* the corresponding portion of *its own income and excess profits taxes*.

(5) The *Ultra Vires* Aspect of Gifts.

Board's Opinion: In the case at bar, “‘if the directors [of the employer] *could not give away* this sum, and the books of the corporation show that it was *not* given away, it must be presumed that the payment was *not a gift.*’” [Tr., p. 29.]

Answer: In its essence, the gift was made, *not* by the employer, but out of assets the equitable title to which was in Pacific Lighting Corporation, the holding company. Not only did Mr. Day say to Taxpayer that the payment had been “arranged for” by the holding company, but in the circular letter addressed by him to the transferred employees it is stated that “*arrangements have been made* to grant you additional compensation *in recognition* of the value of your past services.” [Tr., p. 21.] To state that such “arrangements have been made” is far more consonant with Mr. Day’s oral statement that the

holding company had made *arrangements* for payment *through the subsidiary* than it is with action taken *independently* by the subsidiary. A payor acting in its own right would declare *its purpose to make* the payments in question, and not that “*arrangements had been made*” in that behalf (circular letter), or that the *holding company* “*had arranged to pay a gift or bonus*” (conversation between Taxpayer and Mr. Day). Of course, the *verb* “*arrange*” could naturally have been used in the circular letter, but if the “*arrangement*” had been that of *Gas Company itself*, and not of its holding company, the natural form of the clause employing that verb would have been,—“*the Corporation [Gas Company] has arranged to grant you additional compensation.*”

(6) Taxpayer's Burden of Proof.

Board's Opinion: Taxpayer “has not sustained his burden merely by proving—if in fact he has proved—that [the payment] was *improperly treated* on the books of the Corporation [for] it was incumbent upon [taxpayer] *to prove* that the Corporation was *not discharging some obligation to him* by making the payment in question, [and] the evidence indicates that the payments were made *to compensate the employees for their loss of rights* under the ‘Uniform Pension and Benefit Plan’ *or to enable the company to withdraw the funds* which had been put up with the Insurance Company in connection with such Plan.” [Tr., p. 31.]

Answer: The position taken by the Board in the sentence last quoted has already been sufficiently answered. As for the statement casting doubt upon Taxpayer's *proof* that the payment was *improperly treated* on the books of the Corporation, we submit that the proof in this behalf

established that fact beyond controversy. Both Taxpayer and Mr. Houghton testified that *neither Taxpayer nor the other transferred employees ever performed any services in connection with the sale of the employer's electric properties. The payments, therefore, could not properly be treated as they were on the books and in the income tax return of the employer as an "expense" of such sale. None of the retained employees received any such payment and they had exactly as much to do with the sale of the electric properties as the transferred employees,—that is to say, absolutely nothing. On the other hand, if the payments were "additional compensation," it would have been properly an operating expense; but when Mr. Houghton was asked why it was not so treated on the books of the company and in its income tax return, he said that it was because "it was so definitely not ordinary operating expense; it would never have been made except for the sale of the electric properties or some other abnormal or extraordinary transaction."* [Tr., p. 63.] That is to say, it was *not* an operating expense *at all*; but as *compensation* of any kind for the only type of services performed by the payees,—*i. e.*, services *not* connected with the sale but with ordinary operating utility services,—it could *only* have been an *ordinary operating expense*.

In this passage of its opinion, the Board of Tax Appeals places itself in a dilemma. If the payments *constituted* an *operating expense*, they were *improperly treated* on the books and in the income tax return of the employer; while if they were *not* an operating expense, they were *correctly so treated*. But if they were correctly so treated,—namely, as an expense of the *sale*,—they *could not constitute compensation* to Taxpayer and the other payees, respectively, because none of them had *done any-*

thing in connection with the sale, and one simply *cannot* be *compensated* for *nothing*. As the payments could *not* constitute *compensation at all* to *them* for *sale* services rendered by *others*, by the same token, they could not constitute “*additional compensation*,” there being no *original* “*compensation*” to be augmented. Since, in the concept of “*compensation for personal service*” there is inherent the element of a *consideration* for the “*compensation*,” and as the distinguishing characteristic of a “*gift*” is the *absence* of any consideration therefor, the two expressions are of necessity mutually exclusive. The noun “*compensation*” comprehends the idea of something moving,—usually an equivalent in value,—from the person *compensating* to the one *compensated*, *i. e.*, a legal consideration.

Taxpayer’s employer first advised him that the prospective payment was a “*gift*” “*arranged for*” by its *sole common stockholder*. Later, this payment was, in the Day letter and in the voucher check, denominated “*additional compensation for past services*.” Although Taxpayer received said letter some little time after the date that it bore, the check was issued twenty-three days after the date of the letter and contemporaneously with such issuance it was entered in the employer’s books as “*expense of sale*” of its electric system. Still later the employer, *under oath* in its income tax return, claimed the aggregate payments of the same character as a *deductible* “*expense of [said] sale*.” Now, if *no consideration* moved from Taxpayer to the employer *in connection with such sale*, it could not be otherwise than a gift in the absence of further evidence of *intent*. The only other such evidence is the characterization of the payment as “*additional compensation for past services*” in the Day letter and the

check. This, *if it stood alone*, would negative the idea of a gift; *but it does not stand alone*. The book entries and the income tax return *allocated* the payment *to a particular transaction* in which Taxpayer was *not employed* and in which he rendered *no service*; it was a transaction handled *entirely by outside attorneys*. The falsity of this allocation *not being apparent* on the face of either, the generality of the allocation in the Day letter and the voucher check would lead one with access to *all* the writings, *but without further information*, to only one conclusion,—namely, that the “*past services*” referred to in the *letter* and in the *check* were the *same services specifically allocated* to the sale in both the *book entries* and the *income tax return*.

Although the character of a payment by an employer to an employee is a matter of *intention*, Mr. Day’s conversation left no doubt in Taxpayer’s mind but the intent here was to make him a “gift” in “*recognition*” of satisfactory work done in the *franchise cases*. A payment either is a gift, or it is not. If there is a *consideration* for it, it is *not a gift* of any character; if there is *no consideration*, it *cannot be anything but a gift*. The effect of the employer’s characterization of the payments as “additional compensation” is nullified by the other and contradictory *indicia* of the employer’s intent in making the same above discussed.

In short, the payment was earmarked by the employer, first as a “gift,” and then as “expense of sale” of its electric system. On the records that would be scrutinized by taxing authorities, it was given an appearance calculated to induce their allowance of the same, without inquiry, as a *deduction* from gross income. Again, in the circular letter and in the checks the payment was declared to be

“extra compensation.” Why this characterization was adopted is rendered clearer than the light of day by Mr. Houghton’s testimony that “*the tax angle*” was given consideration in phrasing both letter and checks, and that it was accordingly determined to style the payments “*additional compensation*” in order “to make the [aggregate] payment in such manner as would be *considered* a proper *deductible expense* of the corporation * * * *as against the profit on the sale.*” [Tr., pp. 64-65.] Considered by whom? Not by the Corporation,—for it was the moving party and knew the true facts,—but by the Commissioner of Internal Revenue when he came to auditing the Corporation’s income tax return. However, this treatment of the payment as an expense of the sale of the Corporation’s electric system, while giving it the *aspect* of a *deductible expense*, *definitely tied it down to a specific transaction* in which Taxpayer and the other transferred employees had *no part* and performed *no services*. Thus, the Corporation’s effort in designating the payment as “extra compensation” was *self-frustrated*, for if truly such, it should have been entered on its books and in its income tax return as an *operating expense*.

If the Corporation had adhered to what was indicated in the Day letter and in the checks (which were matters of some notoriety), it would have returned these payments for income tax purposes as an ordinary *operating expense* for the taxable year 1937. Instead of so doing, it adopted the wholly inconsistent position, in the relative secrecy of its books and its income tax return, of *divorcing* these payments from its *ordinary operations* and treating them as an “extraordinary” and unique expense “incurred,”—a verb connoting an *obligation* to pay,—*in effecting the sale* of the entire capital assets of its electric system to the City.

(e) Even If Consistent With Its Other Acts, the Payor's Designation of the Payment as Compensation Could Not Alter Its Essential Character.

The payor could not, merely by characterizing its payment to Taxpayer as "extra compensation," make it such for *any* purpose if, in fact, there were *no past services* constituting the *consideration* therefor. Similarly, the payor could not, by treating such payment as an *original expense* incurred for services rendered in effecting the sale of the electric system theretofore operated by it as part of a combined gas and electric business, *make* it such *expense*, if in fact *no such services* had been rendered. Further, Taxpayer and the other employees of Gas Company transferred to the City's Department of Water and Power had rendered services (Taxpayer, for some 17 years) in the ordinary run of that Company's going utility business. Taxpayer's services were in his professional capacity, and for some nine years he had been *exclusively* engaged in defending the Company in franchise cases,—two *gas* and one electric,—the whole object of which defense was to *preserve* its status as an operating gas and electric public utility through the establishment of its right to use the streets of The City of Los Angeles for the distribution of electricity *and also gas*, and to use the streets of the City of Pasadena for the distribution of *gas* only. With the sale of the electric system went the Company's electric franchise and its means of further operating at all as an electric utility,—the very thing that for nine years Taxpayer *had succeeded in avoiding*. No wonder he was not taken into the Company's confidence in respect of such sale or called upon to render any services in that connection. No wonder it was handled by attorneys who were not salaried employees of the Company, but were specially retained for that purpose. To

permit Commissioner now to assert that what, on the Company's books and in its income tax return, it declared to be an *expense incurred in effecting that sale*, was *not* such, but was, in truth and in fact, "extra compensation" paid to employees transferred to the vendee with the electric system,—to wit, for *past* services rendered by them in the *ordinary operations* of the Company *in which alone had they served and which had nothing to do with the sale*,—would be to stultify the Company and to substitute for its *intention*, as thus manifested, the wishful thinking of Commissioner to the contrary.

In this connection, it is to be remembered that *no extra compensation* was *ever* paid to the employees *retained* by Gas Company. Obviously, in a body of some 2500 employees, it is *not* within the range of *possibility* that *only* the 840 who were transferred to the City had ever performed services *sufficiently meritorious* to be accorded *extra compensation* therefor. Moreover, Taxpayer and many of the other transferred employees had been employed and rendered service,—*not* exclusively in the operation of Gas Company's electric system,—but in the gas department as well,—*e. g.*, meter readers, collectors, clerical employees, solicitors, *etc.* Although the payments in question were made to employees within this category upon the *same basis* as were the payments to those who were employed *exclusively* in the *electric* department, at least one-half of the activities of the *former* were in the *gas* department for which the *latter rendered no services*,—a circumstance further indicative of the *lack* of any *relationship* between such payments and the *ordinary operating expenses* of the employer, and bringing into relief the differentiation made between retained employees and transferred employees who had *served in both departments*.

(f) The Payor's Purpose Underlying Its Contradictory Treatment of the Payments to the Transferred Employees.

In making the payments to the transferred employees, Gas Company found itself in a dilemma. It desired to *recognize*, by substantial payments, the *past services* of such employees. As we shall presently point out, the several amounts of those payments *were not based* upon any *evaluation* of those services, but upon a rule of thumb having only an *indirect relation* to the *value* thereof, and *no relation at all* to any *difference* in such value as between the several employees. There originally accompanied this desire, or subsequently developed, a purpose to take advantage of the payments in question as a deduction for income tax purposes. If the payments were truly "extra compensation," they were properly deductible as an *operating* expense of the payor *only* for the year 1937 in which they were made, and it was unnecessary,—indeed, would have been improper,—for Gas Company to open up its books for the previous years in which the several payees had been employed.

There is no legitimate, or even plausible, explanation in the evidence why such payments, if in fact "*extra compensation*," were *not* entered on Gas Company's books for 1937 and in its income tax return as an *operating* expenditure made in that year, or why they were instead treated on those very books for 1937 as an *expense of the sale deductible* from the *gross selling price* of the electric system to determine the profit realized. However, if any treatment of the payments in this manner was to escape questioning by the Commissioner of Internal Revenue (and, perhaps, by the Railroad Commission and the Franchise Tax Commissioner of California), it was es-

sential that *none* of the *transferred employees* should *claim* his payment to be a *nontaxable gift*. Accordingly, the expedient was adopted,—notwithstanding the entries on the payor's books and in its income tax return (to which the payees had no access),—of advising *them* by circular letter that the payments constituted “additional compensation for past services.” Every transferred employee (except Taxpayer) took that letter and the voucher check at face value, and treated his payment as taxable income. Taxpayer, however, was not similarly lulled into unquestioning acceptance of this (to him) *belated* representation,—obviously, because of Mr. Day's *contrary declaration* (made to *him* and to *no other* employee), that *his* payment was a *gift* “*arranged for*” by the payor's *sole common stockholder*; and, accordingly, the whole transaction was brought to light herein.

(g) As the Payment to Taxpayer Was Neither Extra Compensation for Past Services Nor Compensation at all for Services in Effecting the Sale of the Electric System, It Could Only Have Been a Gift.

Gas Company has, by its book entries and its income tax return, effectually closed the door upon any possibility of claiming that its *intent*, in making the payments in question, was to grant “*extra compensation*” for *operating services* in the past rendered by *operating employees*, and thus Commissioner's basic point is eliminated from the case. By the same token, it is open to the Commissioner of Internal Revenue successfully to attack that return as erroneous, and thereupon to resist any effort by Gas Company now to treat those payments as an *ordinary operating expense*. It necessarily follows that the payments, which in the Commissioner's dealings with

the payor, must be treated *neither* as an *expense of the sale* in question *nor* as an ordinary *operating expense*, but as a *gift* (the only remaining alternative), must be herein treated in precisely the same way.

(h) Additional Authorities Illustrative of Facts Characterizing as Gifts Payments by Employer to Employee.

Despite the foregoing discussion of *Bogardus v. Commissioner*, *supra*, and of the facts in the case at bar demonstrative of the controlling authority of the case cited, a brief further reference to certain of the decisions will be illustrative and helpful.

In *Jones v. Commissioner*, 31 Fed. (2d) 755 (C.C.A. 3rd Cir., 1929), stockholders, who had substantially the same holdings in two affiliated corporations employing the same administrative staff, joined in selling their stock to other parties for some \$3,000,000.00. This sum was deposited for them with a trust company which, by their consent, disbursed the same in defraying the expenses of such sale, in distributing a total of \$300,000.00 to the employees constituting such administrative staff, and in allotting the balance *pro rata* to the stockholders for their stock. The Court, in holding said \$300,000.00 to be "a nontaxable gift", said:

"The situation was that an unexpected good sale was being made of the coal, railroads, and mines. The administrative staff had been long employed, and it was felt that *with the change of ownership they would lose their positions*. It was at first thought they should and could be paid something by the companies, but it was determined the *directors* could not *gratuitously* dispose of the corporation's assets at the expense of the stockholders, *for*, as found by the

Tax Board, *none of these employees had anything whatever to do with securing a purchaser for the properties.* But when later the stockholders individually, and *without obligation* on their part, or *any consideration* then or theretofore received or rendered them, chose, *in recognition of the past faithful work of the staff*, to *gratuitously* give them this financial recognition, and in doing so took from their own pockets and not from the assets of the companies, we are clear *the gratuity thus bestowed was a gift, * * *.*"

31 Fed. (2d) 755-756.

In the case at bar, the essential facts are in practical identity with those treated as controlling in the case last cited. We note this parallelism as follows:

(1) A sale was being made of Gas Company's electric properties which resulted both in a *large profit* and also in the *settlement of litigation* that had not only been expensive but had *threatened its very existence* as a public utility furnishing (except for lighting) either gas or electricity in Los Angeles or gas in Pasadena.

(2) It was realized by Gas Company and by Pacific Lighting Corporation, its sole common stockholder, that approximately one-third of the former's personnel,—many of whom had been long so employed,—would inevitably lose *that* employment, and it was obvious that they either might not be employed, or (if employed) might not be retained, by the City.

(3) It was first thought that Gas Company might be able to make arrangements with Metropolitan Life Insurance Company for some sort of pension for the employees with whom its relations were thus to be severed, but this was found impossible.

(4) As *none* of these employees *had anything whatever to do with negotiating or effecting the sale*, and as Gas Company could not *gratuitously* dispose of its assets at the expense and without the consent of Pacific Lighting Corporation (the sole stockholder to be affected), that holding company “without *obligation* on its part, or *any consideration* then or theretofore received or rendered [it], chose, *in recognition of the past faithful work* of the [employees affected by such sale], to *gratuitously* give them this financial recognition” by “*arranging*” for the disbursements through Gas Company, and by so doing, in effect “took from its own [treasury] and not from the assets of [Gas Company]” the funds necessary to make the disbursements. Clearly, as was held in *Jones v. Commissioner, supra*, “the *gratuity* thus bestowed was a *gift*.”

In *Blair v. Rosseter*, 33 Fed. (2d) 286 (C.C.A. 9th Cir., 1929), the taxpayer had been president of a corporation from 1910 to 1920, and during that period was paid an annual salary of \$6,000.00 “*in full compensation* for such services.” In 1920, the stockholders instructed the Board of Directors to authorize the payment of \$50,000.00 to him “as a gift *in recognition of his able and successful direction* of the affairs of the company during the past ten years.” In affirming a decision of the Board of Tax Appeals holding such payment to be a gift not subject to income tax, the Court said:

“A gift is generally defined as a *voluntary* transfer of property by one to another, *without any consideration or compensation therefor*. 28 C. J. 620. The payment here in controversy was denominated a gift by both stockholders and directors; it was without consideration or compensation, and we think it must be conceded that it has all the earmarks of a gift or

windfall. The Commissioner seems to contend that there was a consideration for the payment, but manifestly an agreement on the part of a corporation to pay additional compensation to its president for services performed over a period of ten years *for which he had already been fully compensated is without consideration and void*. *Alaska Packers' Ass'n v. Domenico* (C.C.A.) 117 F. 99.

"If the agreement had remained *executory*, no court would enforce it; if the corporation was *insolvent* at the time, no court would refuse to set the transaction aside at the suit of a creditor or a trustee in bankruptcy, and, if the corporation *had attempted to deduct the amount of the payment from its gross income for tax purposes*, we have little doubt that the government could successfully contest its right to do so. It is said that the corporation paid no income tax for the year in question, but, if that be true, it would in nowise change the nature of the transaction."

33 Fed. (2d) 286-287.

In *Barnes v. Commissioner*, 17 B.T.A. 1002, the payment in question was held to be a *nontaxable gift* notwithstanding the fact that it had been *by the donor denominated "additional compensation,"* the Board of Tax Appeals according recognition to the tendency of the more modern decision,—*e.g.*, the *Jones* and *Rosseter* cases, *supra*,—so to regard payments such as those there involved.

In *Cowen v. Seymour*, [1920] 1 K. B. 500, the payment was made by direction of the *stockholders* of the corporation,—just as, in the case at bar, the sole common

stockholder of Gas Company “arranged” for the payment to Taxpayer. The Court, in the course of an opinion holding the payment in question to be a *nontaxable gift*, said:

“* * * the fact that the *office* [of the recipient of the payment] *has terminated* is a matter of *very great importance*” [p. 509],

i.e., as indicating that the payment was *not* in respect of such *office*, but as a *solatium* for its *loss*.

This same circumstance is adverted to in *Stedeford v. Beloe*, [1932] A. C. 388, the Master of the Rolls saying:

“It [the payment] was not given to him *in respect of his office* as headmaster, *because he no longer holds that office* of headmaster.” [p. 390]

And, in a concurring opinion, one of the Lords Justice quotes from an earlier opinion of the same Master of the Rolls as follows:

“‘It was a mere donation [on retirement] given each year with no certioration that it would be repeated in the year following.’” [p. 391]

It will be remembered that the payment in the case at bar was determined upon *in contemplation of the termination of Taxpayer’s employment* entailed by the sale of Gas Company’s electric properties; that such payment would *not* have been made except for that “abnormal or extraordinary transaction”; and that *no similar payment* was made to the employees who did *not* suffer the *loss of their positions* with Gas Company as a result of that sale.

In *Chibbett v. James Robinson & Sons*, 132 L. T. (N.S.) 26, the Court denominates the payment there in question as "*compensation for loss of office or employment*,"—such loss having been caused by the reorganization of a corporation engaged in ocean transport,—and says:

"* * * It [the employer] gave this *solatium* to the respondents out of its *abundant prosperity* once and for all, *not* because of anything they *were* doing, but * * * as a *testimonial* for what they *had done in the past in that office which had now terminated*."

There is a very special aptness in the Court's observations last quoted, for it will be recalled that Gas Company's president declared to Taxpayer that the payment to *him*, for which its holding company had "arranged," was "*in recognition of [his] fine work in the franchise cases*,"—a matter *past and gone forever* and in its day constituting litigation unique not only in Gas Company's experience but, seemingly, in jurisprudence. Even in the circular letter addressed to the transferred employees by Gas Company's president, the addresses are notified that "the sale of our electric properties to The City of Los Angeles * * * will make it necessary that the people who operate these properties *sever their relations* with Los Angeles Gas and Electric Corporation." The letter then proceeds to express to them "my very great *appreciation* of the *splendid service* you have rendered during the past years, and of the fine *support* you have given to me and to our management generally *in the conduct of our electric business* * * *." *Arrangements have been made to grant you additional compensation in recognition of the value of your past services.*"

Conclusion.

The facts elicited at the hearing herein, summarized in the opening pages of this brief, and the authorities above cited, demonstrate that the sum of \$8,394.92, paid to Taxpayer by his former employer *on the termination of his employment* under the circumstances above set forth, constituted a *nontaxable gift*. Accordingly, the decision of the Board of Tax Appeals holding it to be “compensation”, and as such taxable income for the year 1937, is erroneous and should be reversed.

Respectfully submitted,

SAMUEL POORMAN, JR.,

Petitioner pro se.

No. 10090

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

SAMUEL POORMAN, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS**

BRIEF FOR THE RESPONDENT

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10090

SAMUEL POORMAN, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 25-32), which is reported in 45 B. T. A. 73.

JURISDICTION

This petition for review (R. 33-37) involves federal income taxes for the year 1937. On March 27, 1940, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$708.92. (R. 9-12.) Within ninety days thereafter and on May 27, 1940, the taxpayer filed a petition with the Board of Tax Appeals for a redetermination of that deficiency under the provisions of Section 272 of the

Internal Revenue Code. (R. 3-8.) The decision of the Board of Tax Appeals sustaining the deficiency was entered September 16, 1941. (R. 32-33.) The case is brought to this Court by a petition for review filed December 5, 1941 (R. 33-39), pursuant to the provisions of Section 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether an amount received by the taxpayer from his employer upon the termination of the employment in 1937, was additional compensation for personal service and therefore includible in gross income under Section 22 (a) of the Revenue Act of 1936, or exempt as a gift under Section 22 (b) (3).

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, * * *.

(b) *Exclusions from Gross Income*.—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, bequests, and devises*.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

STATEMENT

Petitioner is a resident of Los Angeles, Clifornia. He is an attorney at law, employed by the city of Los Angeles. For a period of about 17 years prior to January, 1937, he had been employed in the legal department of the Los Angeles Gas & Electric Corporation, the greater part of which time he had been engaged in defending the corporation in litigation instituted by the city of Los Angeles and the city of Pasadena. (R. 15-16.)

During 1935 negotiations were begun looking to the sale of the electric properties of the corporation to the city of Los Angeles. Final agreement was executed in October 1936, under which such properties were sold to the city as of January 31, 1937, for approximately \$46,000,000. In connection with the sale approximately 840 employees of the corporation, including the petitioner, were transferred to the Department of Water and Power of the city of Los Angeles. The petitioner did not enter the employ of the city until March 1, 1937. (R. 16.)

Petitioner's salary, which from 1929 forward had been \$1,000 a month, was paid in full at that rate by the Los Angeles Gas & Electric Corporation to and including January 31, 1937. (R. 16-17.)

In September, 1932, the corporation and several other public utility companies in southern California established a "Uniform Pension and Benefit Plan" for their employees. This plan provided that each participating employee should contribute, by payroll deduction, three percent of his current wages to be "used solely to pro-

vide a portion of his total retirement income." The company was to pay the entire balance of the net cost of the employees' retirement income and in addition provide and administer at its own expense the death and disability benefits. It was also provided that the companies' contributions, once made to these funds, must be used for employee benefit only and not diverted to any other purpose. (R. 17.)

Under this plan normal retirement age was 65 for men and 60 for women. The amount of the monthly pension was to be based on the wages and length of service. If an employee withdrew or was released from service prior to normal retirement age the amount of his contribution was to be returned to him. The minimum pension for those who completed 20 or more years of service by normal retirement date was to be \$45 per month. The death benefit was to be an amount equal to one year's wages, with a minimum of \$2,000 for full-time employees. Special provisions were also made for disability benefits and employee contributions were to cease during the period of disability. (R. 18-19.)

When it became obvious that the sale would be consummated and a number of the corporation's employees transferred, it was recognized that these employees were losing various rights in leaving the service of the corporation and that "severance of employment meant sacrifice of pension rights." (R. 20.) In consideration of this fact the officers of the corporation wanted to do something for the employees being transferred. After much discussion and study the corporation decided about December, 1936, to make a payment to each of the

transferred employees based upon his age, length of service with the company, and wages received during the period of employment. The "tax angle" was also taken into consideration and it was decided to make the payment in such a manner that it would be a proper deductible expense of the corporation in computing the net profit from the sale. It was determined that the words "additional compensation" would accurately describe the payments. (R. 20-21.)

Accordingly, about January 25, 1937, the Los Angeles Gas & Electric Corporation sent two letters to each of the employees being transferred. One letter, signed by the president and general manager of the corporation and addressed to "Employees about to be transferred from the service of our Company", contained the following statement (R. 21-22):

Arrangements have been made to grant you additional compensation in recognition of the value of your past services. The amount of this payment will be based upon your present attained age, your length of service with the Company, and the rates of wages received during your period of employment; but this extra compensation will not be paid to employees whose "employment date" is more recent than September 1, 1934. Checks will be mailed to you as soon as possible after our electric properties have passed to the City.

The other letter was addressed to the members of the Uniform Pension and Benefit Plan who were being transferred and informed them that their membership in the plan would cease with the termination of their

service with the corporation and that checks would be sent covering the amount of their contributions to the plan. (R. 22.)

Petitioner received these two letters sometime after January 25, 1937. On that date he was notified by the president of the corporation that he was to be transferred to the water and power department of the city. "In the course of this conversation" (R. 22), the president advised him arrangements had been made to give a bonus to the employees who were to be transferred.

About February 19, 1937, the petitioner received from the Los Angeles Gas & Electric Corporation a check for \$8,394.92, to which was attached a voucher reading as follows (R. 23):

Additional compensation for services to and including January 31, 1937, in accordance with the President's letter of January 25, 1937. No. 26, Total amount, \$8,491.34. Deductions, Federal O. A. B., \$20. State, U. I., \$76.42. Net amount, \$8,394.92 This statement constitutes a valuable record of your earnings and the contributions you have made toward future social security benefit We recommend that you keep it for your further reference. Los Angeles Gas & Electric Corporation, detachable for presenting for payment.

The payments made by the corporation to the transferred employees, aggregating \$475,546.32, were charged to a ledger account designated "Sale of Electric Properties, Suspense Account." (R. 23.) On the books of the corporation the payments to the employees were treated as an expense incurred in connection with the

sale of the electric properties. In the corporation's income tax return for 1937 these payments were treated in the same manner and were deducted from the amount received from the city in computing the net profit realized from the sale of the electric properties. (R. 23-24.)

No bonus or additional compensation was paid to the employees retained by the corporation. Neither the petitioner nor any of the employees transferred had anything to do with the sale of the electric properties. (R. 24.)

In his income tax return for 1937 the petitioner reported this payment of \$8,394.92 as a gift and non-taxable income other than interest. The Commissioner determined that the \$8,394.92 was additional compensation and added this amount to the net income shown in petitioner's tax return for 1937. (R. 24-25.)

The Board of Tax Appeals sustained the Commissioner's determination and entered its decision for deficiency for 1937 in the amount of \$708.92. (R. 32-33.) The case is brought to this Court on petition for review filed by the petitioner. (R. 33-37.)

SUMMARY OF ARGUMENT

One of the primary factors in determining whether a payment is a gift or compensation is the intention of the parties, particularly the intention of the payor. The facts in this case show compensation was intended. The payor called it additional compensation. The value of the employees' past services was the measuring rod determining the amount of payment. The payments

were deducted by the payor in its income tax return. The evidence shows it was a business transaction in which the corporation was recognizing, at least, a strong moral obligation to compensate the employees for loss of the benefits of the pension and benefit plan.

The determination of the Commissioner was correct and the petitioner had the burden of overcoming that presumption. The showing of an absence of a technical consideration is not sufficient; he must prove that a gift was intended. A technical legal consideration is not necessary since a payment may be compensation for services although made voluntarily and without legal obligation. There is no presumption in favor of a gift and the burden of proving it is upon the donee. Petitioner has failed to sustain that burden in this case.

All factors here to be considered lead to the conclusion the payment was compensation and not a gift. The decision of the Board should therefore be affirmed.

ARGUMENT

The \$8,394.92 paid to the petitioner by the Los Angeles Gas & Electric Corporation in February, 1937, was additional compensation and not a gift within the meaning of the tax statutes

Section 22 (a) of the Revenue Act of 1936, *supra*, provides that gross income includes "compensation for personal service, of whatever kind and in whatever form paid."

The only question in this case is whether the amount paid to the petitioner by his employer, the Los Angeles Gas & Electric Corporation, about February, 1937, was additional compensation subject to tax or was a gift specifically exempt from gross income under the statute.

Various factors have been considered by the courts in arriving at a determination of whether a payment is compensation for services or a gift, the particular facts in each case forming the basis for the court's conclusion.

One of the highly important and primary factors to be considered in each case is the *intention* of the parties, particularly that of the payor, gathered from the facts and circumstances surrounding the transaction. *Fisher v. Commissioner*, 59 F. (2d) 192 (C. C. A. 2d); *Botchford v. Commissioner*, 81 F. (2d) 914, 916 (C. C. A. 9th); *Bass v. Hawley*, 62 F. (2d) 721 (C. C. A. 5th); *Walker v. Commissioner*, 88 F. (2d) 61 (C. C. A. 1st); *Schumacher v. United States*, 55 F. (2d) 1007, 1010 (C. Cls.); *Willkie v. Commissioner*, decided May 12, 1942, by the Circuit Court of Appeals for the Sixth Circuit, not yet reported but found in 1942 C. C. H., Vol. 4, par. 9470.

The facts in the instant case definitely show that the payment to the petitioner here was intended by the corporation as additional compensation. Throughout the record it was referred to by the corporation, the payor, as "additional compensation". In January, 1937, letters were addressed to the employees who were to be transferred, and signed by the president, advising them that they would be granted "additional compensation in recognition of the value of your past services." (R. 21-22.) About February 19, 1937, the petitioner received from the Los Angeles Gas & Electric Corporation a check for \$8,394.92, to which was attached a voucher stating that it was additional compensation for services in accordance with the president's letter. This voucher

also showed deductions for federal old age benefits and state unemployment insurance, such as would be made in a regular salary payment. Nowhere in the official statements of the corporation does the word "gift" appear. It was not a gift in round figures, but compensation, figured down to the odd cents, the value of the employee's past service being the measuring rod for the amount of the payment made in each case. The payment to this petitioner was measured by his salary and length of service, in which aspect it had a direct relationship to the services performed. *Willkie v. Commissioner, supra*; *Levey v. Helvering*, 68 F. (2d) 401 (App. D. C.)

Another important factor in determining whether a payment to an employee was a gift or compensation for services, is whether the payor deducted it in making his income tax return. *Noel v. Parrott*, 15 F. (2d) 669 (C. C. A. 4th), certiorari denied, 273 U. S. 754; *Botchford v. Commissioner, supra*; *Fisher v. Commissioner, supra*; *Willkie v. Commissioner, supra*; *Lougee v. Commissioner*, 26 B. T. A. 23, affirmed 63 F. (2d) 112 (C. C. A. 1st). In its income tax return for 1937 the corporation in the instant case deducted the payments made to the employees who were transferred, as an expense in connection with the sale. This fact further shows that the corporation did not intend the payments here to be gifts.

Part of the benefit accruing to the employees during their period of employment, in addition to the actual salary received, was their rights under the uniform pension and benefit plan, to which the corporation was

contributing both money and services. The sums contributed by the corporation were to be used for the employees' benefit and for no other purpose. When it was found impossible to continue these rights and benefits for the employees in question, the corporation determined, after much study and consideration, to make a cash payment to these employees as additional compensation for past services. It was the opinion of the Board that the evidence indicated that the motive of the corporation for making the payments to these employees was to compensate them for loss of their rights under the uniform pension and benefit plan, or to enable the corporation to withdraw the funds which had been put up with the insurance company in connection with the plan.

The evidence definitely shows that it was a business transaction, involving about one-third of the corporation's employees, and that the corporation was recognizing, at least, its strong moral obligation to compensate these employees for loss of the benefits of the pension plan.

After consideration of all the facts and evidence before it, the Board held that the Commissioner was correct in his determination that the payment to the petitioner in this case constituted compensation for service. The determination of the Commissioner was presumptively correct, and the burden was upon the petitioner to overcome that presumption. *Welch v. Helvering*, 290 U. S. 111; *Buck v. Commissioner*, 83 F. (2d) 786, 788 (C. C. A. 9th); *H. Liebes & Co. v. Commissioner*, 90 F. (2d) 932 (C. C. A. 9th). The Board

held that the petitioner in this case had failed to sustain the burden resting upon him.

Petitioner emphasizes the language used by the president of the corporation in a casual conversation had with him prior to receipt of official notice of the payment here in question, in which conversation the president advised him he was to receive a "bonus". The courts have held that "a bonus is not a gift or gratuity but a sum paid for services or upon a consideration in addition to or in excess of that which would ordinarily be given." *Levey v. Helvering, supra*, p. 403; *Noel v. Parrott, supra*; *Schumacher v. United States, supra*.

Petitioner contends that inasmuch as he had been paid the full amount of his agreed salary the additional payment was without consideration. Even the lack of a technical consideration would not be sufficient to overcome the Commissioner's determination and the decision of the Board. The petitioner must show that the payment to him was intended to be and was in fact a gift.

Consideration in a technical legal sense is not necessary to constitute a payment compensation. It is settled law that a payment may be compensation for services although made voluntarily and within legal obligation. *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 730; *Fisher v. Commissioner, supra*; *Weagant v. Bowlers, supra*; *Willkie v. Commissioner, supra*; *Bass v. Hawley, supra*. This Court, in *Botchford v. Commissioner, supra*, quoted with approval (p. 916) from the *Fisher* case, as follows:

The doctrine that bonus payments and gratuitous "additional compensation" for past services may constitute taxable income had been frequently recognized in decisions of the lower federal courts and of the Board of Tax Appeals.

In view of the reasons shown by the corporation for making the payments in this case, the adjustment of payments according to past services and salaries, the statements contained in the letter from the corporation's president and in the voucher attached to the checks, the deduction of old age benefits and unemployment insurance from the checks by the corporation, and the deduction of the payments by the corporation in its income tax return, it is submitted the amount received by the petitioner was intended to be and was in fact additional compensation and not a gift.

In the *Botchford* case this Court also called attention to the principle that there is no presumption in favor of a gift, and the burden of proving it is upon the donee. The petitioner in this case has failed to sustain the burden of showing the payment made to him was a gift.

Petitioner relies principally upon the decision in the case of *Bogardus v. Commissioner*, 302 U. S. 34, in which the Court was divided in its opinion five to four. The decision in that case rested upon the particular facts there present. This was set out by the court in *Willkie v. Commissioner, supra*, as follows:

In reference to the *Bogardus* case, it should be borne in mind that it is unsafe to classify adjudicated cases upon any complex question of law and to extract from them rules of general application as the reasoning in such cases is often due

to their diversities. It is therefore wiser to decide each case upon its own peculiar state of facts as to do otherwise, leads us into the field of abstract reasoning. The *Bogardus* case illustrates the necessity of following this rule. It discusses numerous cases from the circuits and from the Court of Appeals of the District of Columbia, overrules none of them and leaves each as positive authority coextensive with the facts on which the opinion was founded.

In analyzing the situation in the *Bogardus* case, the Supreme Court first emphasized the fact that the recipients of the bounty there never were employees of the Unopco Corporation which made the payments. The Court further concluded the payments could not be treated as compensation in view of the *stipulated fact* that the disbursements were not made or intended to be made for any services rendered to the Unopco Corporation. The Court then stated that if the disbursements had been made by the Universal Company, the employer of the recipients, there might be ground for the inference that they were payments of additional compensation, referring at that point to *Noel v. Parrott, supra*. Further the payments in question in the *Bogardus* case were not deducted in the corporation's income tax return.

In the instant case the petitioner had been an employee of the corporation making the payment to him, and had rendered valuable services to that corporation over a long period. There is no evidence of any statement by the payor, or any stipulation that the payments here were not intended as compensation. On the con-

trary the evidence positively shows that they were intended by the corporation, and stated by it, to be compensation for services rendered. In further confirmation of this fact, the corporation here deducted the payments in its income tax return. It is therefore submitted that the petitioner has failed to bring his case within the facts controlling the decision in the *Bogardus* case.

Petitioner also relies on the cases of *Blair v. Rosseter*, 33 F. (2d) 286 (C. C. A. 9th), and *Jones v. Commissioner*, 31 F. (2d) 755 (C. C. A. 3d). In each of those cases it was found that a gift was definitely intended. In the *Rosseter* case this Court sustained the decision of the Board holding that the payment there was a gift, and pointed out that the payment was denominated as a "gift" throughout the records by both stockholders and directors. In the *Jones* case the court concluded that a gift was intended, since the evidence showed that it was determined that the directors could not *gratuitously* dispose of the corporation's assets, so the stockholders then stepped in and gratuitously made a gift (p. 756), "from their own pockets and not from the assets of the companies, * * *."

Petitioner also cites some English cases in support of his contentions. In view of the many Federal decisions dealing with the question and the many differences between the Federal and the English tax laws, a discussion of those cases is not deemed necessary here.

All the factors to be considered in determining whether the payment in this case was a gift or compensation for past services lead to the conclusion that the

sum received by the petitioner constituted a part of his gross income for the tax year in question.

CONCLUSION

The decision of the Board is correct and it should be affirmed.

Respectfully submitted.

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